Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEANIE MENTAVLOS,

Petitioner,

v.

JOHN JUSTICE ANDERSON and JAMES SALEEBY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

LEON FRIEDMAN
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Counsel of Record

RICHARD A. HARPOOTLIAN
1410 Laurel Street
Columbia, S.C. 29202
(803) 252-4848

Attorneys for Petitioner

122 pp

QUESTIONS PRESENTED

1. Whether Upper Class Cadets at The Citadel, The Military College of South Carolina (a state institution afforded special status by Congress as a senior military college), who were given disciplinary authority by school regulations to demand obedience from entering students and misused that authority to sexually harass incoming women students can be considered state actors in view of the total entwinement of the state in all aspects of The Citadel's operations.

2. Whether the Fourth Circuit erred in continuing to apply a rigid-four part test for state action, in view of this Court's direction in *Brentwood Academy v. Tennessee Secondary School*, 121 S.Ct. 924 (2001) that a more flexible, fact-specific test of entwinement should be applied under which state action is found if there is sufficient involvement of state institutions or sufficient utilization of governmental power in the acts complained of so that the actions should be attributed to the State and the protections of the Constitution invoked.

3. Whether the Court below erred in finding that upper class cadets at The Citadel were not state actors despite the fact that they possessed power granted them by the state to require strict obedience to their orders and exercised that power to inflict punishment on plaintiff because of her gender?

4. Whether the Court below erred in finding that upper class cadets were not state actors despite the fact that they were engaged in training and disciplining lower class cadets for the military, a

function that is traditionally the exclusive prerogative of the State?

5. Whether the District Court erred in granting summary judgment on behalf of one Respondent on the grounds that Petitioner did not produce evidence of any gender based discrimination, despite the fact that the cadet lit a fire on her sweatshirt so that her undergarments could be seen.

PARTIES

The Petitioner in this action is Jeanie Mentavlos.

Respondents in this action are John Justice Anderson and James Saleeby.

Defendants in this action (who are not respondents) are The Citadel, the Military College of South Carolina, The Board of Visitors of The Citadel, the Military College of South Carolina, Richard Ellis, Nicholas Belcher, Eric Amhaus and Edward Bohm.

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PETITION FOR A WRIT OF CERTIORARI

Jeanie Mentavlos ("Mentavlos") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 7, 2001

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 249 F.3d. 301 (4th Cir. 2001) and is reproduced in App. A. at 1a-40a. The opinion and order of the District Court for the District of South Carolina is reported at 85 F.Supp.2d 609 (D.S.C. 2000) and is reproduced in App. B at 41a-86a.

JURISDICTION

The opinion of the United States Court of Appeals Court for the Fourth Circuit was issued on May 7, 2001 and its judgment was issued on the same day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case involves the misuse of power by the Respondents (certain upper class cadets at The Citadel, the Military College of South Carolina) against Petitioner, one of the first females admitted to the institution. Under the "Fourth Class System" described below, all upper class cadets at the Citadel (including Respondents) were given disciplinary power over recently-admitted "knobs" (as the fourth class cadets were called). The official school regulations required knobs to obey the orders of the upperclassmen, and Respondents misused the authority given to them by the State to sexually harass Petitioner. The purpose of requiring strict military discipline within the school and of demanding that newly admitted cadets obey the orders of upperclassmen was to prepare cadets for military life. Furthermore, The Citadel was given special statutory privileges by Congress in recognition of its status as a "senior" military college. Nevertheless, the Fourth Circuit found that the upper class cadets were not "state actors" amenable to suit under 42 U.S.C. § 1983.

In arriving at this erroneous conclusion, the Fourth Circuit ignored this Court's recent decision in *Brentwood Academy v. Tennessee Secondary School*, 121 S.Ct. 924 (2001) (which was cited to the Court) and continued to apply a rigid four-part test previously utilized in that Circuit for determining state action. Under that test, established in *Andrews v. Federal Home Loan Bank*, 998 F.2d 214 (4th Cir. 1993) and later endorsed by the Fourth Circuit in *Haavistola v.*

Community Fire Co. of Rising Sun, Inc. 6 F.3d 211, 215 (4th Cir.1993), state action must clearly fit under one of four subcategories:

> A private party can be deemed a state actor in four contexts: (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. *If the conduct does not fall into one of these four categories, then the private conduct is not an action of the state.* 998 F.2d at 217. (emphasis added)

The Court below cited and endorsed this rigid four-part test. 249 F.3d at 313; 18a.

However, this Court in *Brentwood* rejected any such rigid approach or four-part test. It noted that:

> What is fairly attributable is a matter of normative judgment, and the criteria *lack rigid simplicity.* From the range of circumstances that could point toward the State behind an individual face, *no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient*, for there may be some countervailing reason against attributing activity to the government. 121 S.Ct. at 930. (emphasis added).

In this case there was considerable "entwinement" between the actions complained of in the complaint and the State of South Carolina. Under the *Brentwood* rule, the acts of the Respondents were so entwined with the goals and powers of the State, that they must be considered state action.

Statement of Facts

This case involved the massive effort made by administration and the male student body (the Corps of Cadets) of The Citadel, the Military College of South Carolina, to resist the admission of women to the institution. The male cadets then made the life of the few female cadets who did enroll as uncomfortable and miserable as possible so they would leave. The effort of Shannon Faulkner to enter The Citadel in 1993 lead to a "scorched earth" legal campaign to keep her out. See *Faulkner v. Jones*, 10 F.3d 226, 229 (4th Cir. 1993), 14 F.3d 3 (4th Cir. 1994), 51 F.3d 440 (4th Cir. 1995) and *United States v. Jones*, 136 F.3d 342, 345 (4th Cir. 1998). The school tenaciously fought every legal step taken by Ms. Faulkner to vindicate her constitutional rights, using every delay device possible and appealing every adverse order.

After a two-week trial in 1994, the District Court ordered the admission of Ms. Faulkner to The Citadel. 858 F.Supp. 552 (D.S.C. 1994). The legal fight continued for another year, see 51 F.3d 440 (4th Cir. 1995) before the school was forced to admit Ms. Faulkner in August 1995. (She left after a short time, to the well-publicized delight of the made cadets). [1]

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[1] When Ms. Faulkner arrived at the Citadel in August, 1995, she was met by the most hostile imaginable

Thereafter, The Citadel continued its effort to resist female applicants, proposing to establish a separate female military institution. After this Court held in *United States v. Virginia*, 518 U.S. 515 (1996) that the State of Virginia must admit women to the Virginia Military Academy, (like The Citadel a state-supported military institution) holding that an alternate program at a women's college was not an adequate alternative to full admission and prohibiting the state from excluding women from its state-run military programs, The Citadel gave up all legal efforts to resist the admission of women.

Petitioner Mentavlos was one of four women admitted to The Citadel in the 1996 school year after the school surrendered to the inevitable. She and one

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behavior, almost as bad as the welcome which James Meredith received when he enrolled at the University of Mississippi Law School in 1962. Male cadets wore shirts with a caricature of numerous gray-colored canines and the statement "1900 bulldogs and one bitch" boldly displayed on the front and back. There were threats against her life by outsiders, with little if any effort made to protect or accept her by the institution or its students. On August 18, 1995, she withdrew after less than one week in the school. Upon her departure, the nation witnessed the jubilation of the remaining Corps of Cadets as they danced and rejoiced in the rain on the nightly news after hearing of Ms. Faulkner's decision to leave. Ms. Faulkner's experiences have been described in a recent book, "In Glory's Shadow: Shannon Faulkner, the Citadel and a Changing America," by Catherine Mangold (New York, 2000).

other female cadet left during their first year, following the intense hostility and harassment that they faced.

The Operation of The Citadel

The Citadel is totally controlled by the State of South Carolina. The college was created by state law in 1842 (originally to provide a military force to put down slave rebellions after the Denmark Vesey uprising in 1822). The members of the Board of Visitors, the school's governing body, are the Governor, the Adjutant General, the State Superintendent of Education, seven members chosen by the General Assembly and one of three nominated by Citadel alumni, but chosen by the Governor. See SC St. § 59-121-10. State law also regulates and defines the powers of the Board of Visitors (§ 59-121-40; §59-121-50), regulates its fund raising and scholarship activities (§59-121-55) and allows it to incur debt and issue tax exempt bonds for building dormitories and other facilities (§ 59-122-20; §59-122-30; §59-122-40; §59-122-90). Its professors and administrators are state employees and all paid by state funds.

The school is run on a military model and upper class cadets are an integral part of its operation. As noted in the statutes quoted above, all aspects of the military program at The Citadel are regulated by the State or by state actors, namely members of the Board of Visitors and the administrators who run the school. The Board of Visitors exercised its power to "establish such regulations as it may deem necessary for the organization and good government of said college" as authorized by §59-121-50. Pursuant to this authority, the school issued its "blue book" – regulations which control all aspects of the student-cadets experience.

Pursuant to the blue book and in accordance with the military model on which the school is based, lower class students must obey orders from upper class students. The District Court explained:

> While Citadel staff and administration retain ultimate authority for the operation of this military style system, day-to-day functioning is dependent on the cadet chain of command. Indeed, many of the benefits of the military training model derive from this delegation of authority. The greater responsibilities under the system go to the more senior students, who are supervised and mentored by staff or active duty military personnel assigned to the school. These more senior students, in turn, mentor and supervise those students below them.
>
> The school operates on a military model, with an adversative training system. Blue Book, Chap. 2 (Command, Control and Organization). All students wear uniforms and are subject to extensive military style rules and living conditions. Freshmen, in particular, are subjected to a fairly extreme set of disciplinary and behavioral rules under what is referred to as the "Fourth Class System." 85 F.Supp.2d at 616; 56a.

The District Court quoted from the Blue Book's description of the Fourth Class system.

> "A. GENERAL. The Fourth Class System at The Citadel is singularly unique in its evolution, traditions, implementations, and purpose. The Fourth Class System is the cornerstone of the military lifestyle which surrounds each Citadel Cadet. . . . ." 85 F.Supp.2d at 616; 56a.

The District Court noted further:

> "The Fourth Class System at The Citadel requires strict and unquestioning obedience, mental and physical toughness, and mature tolerance of confrontation and is an intense, high-stress experience designed to facilitate development of 'The Whole Man'" Blue Book Chap. 16.B.Blue Book, Chap. 16.D.2-3. 85 F.Supp.2d at 616-17; 57a.

The Court noted how the system actually works:

> Freshmen must come to attention whenever an upperclassman enters their barracks or speaks to them. Blue Book, Chap. 16.I.2.f. & 3.d. Freshmen are allowed only very limited, formal responses to upperclassmen: "yes Sir;" "no Sir;" "no excuse, Sir;" and "request permission to make a statement, Sir." Blue Book, Chap. 16.G.1. . . . . The freshmen are required to spend time in drill and in performing company details such as cleaning the common areas of the barracks. Blue Book, Chap. 16.J.1-7. They are required to follow detailed and restrictive procedures at meals and to memorize and recite certain factual information at meals and other times. Blue Book, Chap. 16.I.4. a-n & L.1-3. 85 F.Supp.2d at 617; 57a-58a.

The Court acknowledged that there was a tradition of "hazing" under which upperclassmen would impose punishment and abuse on the "knobs."

> In addition to the official rules, which make life as a Citadel freshman unusually restrictive for a college

> student, it is apparently not at all uncommon for upperclassmen to mildly harass freshmen either verbally or by requiring the freshmen to engage in an activity not of the freshman's choosing (e.g., spending long periods of time polishing a given item). *Id.* 58a.

However, the problem was far more serious than the court described. By "custom," there developed a process of severe abuse by upperclassmen against those considered "weak," and it continued from year to year. As many as 72 (or 25% of the incoming students) left during their first year, primarily because of the hazing. (District Court Hearing Transcript at 77).

The school recognized this was a serious problem and initiated a study on what to do about it in 1995. The report noted that: "our high attrition rate and low recruitment rate are directly related to the proliferation of these *traditional* techniques which are grounded in abuse and humiliation. All but two of the hazing cases this year, and the majority of the major violations of the fourth class system, were either reported by parents or cadets who withdrew." *Id.* (emphasis added).

Although "hazing" was prohibited by the blue book, the custom of extreme hazing was so well-established that it continued from generation to generation because, as an official Citadel Report noted, "The universal comment on the part of the upperclassman who was punished [for hazing other students] is that it was the way he was treated when he was a knob, and he believes that this is the way it should be." *Id.*

In addition, although under the blue book, hazing is illegal and should be reported immediately, a 17-year old knob may not be able to distinguish between a lawful but severe order and unlawful hazing. The knobs were given a standard of "unquestioning obedience" and felt they had to obey orders of all upperclassmen (District Court Hearing at 46). The Court below acknowledged this problem:

> Plaintiff was aware that certain forms of harassment were prohibited by official school policy. She was aware that each of the actions now alleged falls within the prohibited actions. She was aware of her options to report improper actions and to refuse to obey an unlawful order.
>
> Nonetheless, there were potential negative consequences to either behavior, of which plaintiff was also aware. Refusal to obey an order could only be undertaken at the risk of disciplinary action in the event the ultimate authority concluded the order was not improper. Given the uniqueness of the system, the average freshman could be expected to have some difficulty discerning the lawfulness of many orders. Most or all of the alleged instances of harassment still at issue in this action, however, were known to plaintiff to be unlawful. . . . .
>
> Certainly reporting harassment or refusal to obey questionable, if not clearly invalid, orders risked an increase in pressure and punishment by upperclassmen in general and the offending upperclassman in particular. In a Fourth Class System such as The Citadel's, which emphasizes class unity, peer pressure is particularly significant

and might also be negatively affected by failure to "go along." 85 F.Supp.2d at 618-19; 61a-62a.

The Abusive Treatment of Petitioner

Almost immediately after Petitioner arrived at The Citadel in August, 1996, a campaign of harassment and hostility began. Within one month of Jeannie Mentavlos' first day at the Citadel, a doctored picture of Jeannie was being circulated on the internet which depicted her as naked and with male genitalia. The knowledge of the picture was widely known throughout the Corps and the administration. Jeannie reported the picture through the proper chain of command and discussed the incident with the regimental commander, Bryant Butler. He informed her that an intense investigation was being conducted. However, the culprit was never found.

Two of the individual cadets who were most responsible for the physical assaults and offensive behavior toward Ms. Mentavlos were Cadets James Saleeby and John Justice Anderson, the two remaining defendants in this matter. The Court of Appeals described three specific incidents involving each Respondent:

> Anderson and Saleeby were each involved in three alleged incidents of improper treatment of her during that fall. With regard to Saleeby, the district court found sufficient evidence to show that Saleeby (1) kicked Mentavlos in the legs on one or more occasions, but caused no bruising, and commented that Mentavlos "'likes to be kicked'"; (2) came into Mentavlos' room wearing only non-uniform gym shorts and shower-type shoes on one

> occasion, although Mentavlos did not interpret the visit as being sexual in nature; and (3) directed another cadet to set Mentavlos' sweatshirt on fire while she was wearing it on one occasion, and then used his foot to put it out before it burned her skin. 249 F.3d at 309; 9a.

With respect to the other Respondent, Cadet Anderson, the Court of Appeals noted:

> With regard to Anderson, the district court found sufficient evidence to show that Anderson (1) pushed cardboard into Mentavlos' face while ranting and raving at her because she smiled while standing at attention, which left welts under her chin that lasted for one or two days; (2) may have treated Mentavlos differently from two male cadets when Mentavlos and another female cadet were caught drinking alcoholic beverages just before the Thanksgiving break; and (3) threatened Mentavlos at various times, stating that he would physically harm or kill her or her brother, who was an upper-class cadet at The Citadel. 249 F.3d at 309; 9a.

Petitioner was required under the blue book rules quoted above to obey the orders of upper class cadets. The district court found that upperclass cadets Anderson and Saleeby "had at least some measure of authority over [Mentavlos] by virtue of the system created and sanctioned by The Citadel, a state institution." reported the cardboard incident and the In the face of this harassing 85 F.Supp.2d at 619; 62a-63a. Petitioner reported the cardboard incident and the boxer shorts incident soon after they occurred. The commandant of the school rejected a recommendation that serious penalties be imposed, the offense was

downgraded to a minor offense and he was given a minimal a punishment which was then suspended. After Petitioner left the school in December, 1996 and a fuller investigation was made, both cadets were disciplined more severely, with Saleeby being suspended for one year and Anderson resigned rather than face suspension. The Court below noted: "Mentavlos did not voice any other complaints until just before withdrawing from The Citadel in December, in part due to a reasonable concern that the male cadets might retaliate against her with more harassment. Once reported, however, The Citadel administration conducted thorough investigations and imposed substantial punishments." 249 F.3d at 309; 10a.

Procedural Background

Petitioner brought an action against The Citadel under Title IX of the Educational Amendments of 1972 (20 U.S.C. §1681 er seq), and against various individual defendants under 42 U.S.C. §1983 Subsequently, The Citadel and two of the cadets settled with plaintiff One defendant defaulted and a damages trial against him is still to be heard. The two remaining non-settling cadets (Respondents Saleeby and Anderson) then moved for summary judgment on the grounds that they were not state actors. The district court granted their motion for summary judgment holding that they were not state actors. The Court found:

> The court, therefore, finds as to the state actor issue that the alleged actions of defendants Saleeby and Anderson fall clearly within the categories of harassment that are expressly prohibited by the official written policy of the school. The court

> further finds that the school's actual enforcement of its official policies relating to the Fourth Class System was adequate to preclude any finding that the school endorsed or encouraged any contrary informal policy. 85 F.Supp.2d at 620; 63a.

The district court found that the type of military training afforded by the Citadel was not different from military training in many other colleges in their R.O.T.C. programs. The court found:

> This court would not find the cadet defendants to be state actors. Their actions may have been made possible by the system established by the state, but these cadets did not receive significant encouragement and did not exercise the state's coercive powers. *Id.* at 626. 78a.

The Court of Appeals affirmed that finding in an interlocutory appeal. [2] It applied the four part standard established in the Circuit in *Andrews v. Federal Home Loan Bank*, 998 F.2d 214 (4th Cir. 1993) under which state action by a private party cannot be found unless it fits under one of four categories: (1) state coercion; (2) state delegation to a private party; (3) exercise of powers traditionally the exclusive prerogative of the state; (4) committing an unconstitutional act in the course of enforcing a right of a private citizen. "If the conduct does not fall into

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[2] As the Court below explained, the order dismissing the complaint against Anderson and Saleeby was not a final judgment since a damages trial against one defaulting cadet is yet to be heard. But all the remaining claims have been disposed of. 249 F.3d at 307; 4a-5a

one of these four categories, then the private conduct is not an action of the state." 998 F.2d at 217. In a slightly different version endorsed in *Haavistola v. Community Fire Co. of Rising Sun, Inc.* 6 F.3d 211, 215 (4th Cir.1993), state action can be found if there is (1) state coercion; (2) close nexus between the state and the action complained of; or (3) the exercise of powers traditionally the exclusive prerogative of the state.

Applying this standard, the Court of Appeals noted that the State of South Carolina did not "coerce" the actions complained of, since the actions were prohibited by Citadel regulations and the cadets were later punished for engaging in them. Further, the Court noted that there was no close nexus between the Respondents actions and the state, since state regulation and financing were insufficient to find the actions attributable to the state. Although the blue book gave upper class cadets power over the incoming "knobs," the power is "quite limited." 249 F.3d at 320; 33a. The school did not encourage the actions in any way, indeed punished them when they discovered what had occurred.

The Court of Appeals also rejected the argument that military training of students is not "traditionally an exclusive state function." It rejected the analogy of The Citadel to the Virginia Military Academy, where this Court held that mission of VMI was to produce "citizen soldiers." *United States v. Virginia,* 518 U.S. at 541. The Court below stated that "As an initial premise, we note that the mission of The Citadel makes no such reference to this military-type goal; rather, the stated mission of The Citadel is to produce community leaders, not soldiers. But, even if

one of The Citadel's purposes was to train civilian soldiers and its upperclass cadets were engaged in serving that purpose, it would not be enough to transform the individual students' actions into state action." 249 F.3d at 316; 25a. It noted that many colleges had R.O.T.C. programs that trained students for the military and many secondary schools had a military-type environment. It quoted the District Court conclusion that "education and training based on a military model are not historically an exclusive state function." 249 F.3d at 316; 25a.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Continued To Apply a Rigid Test for State Action Explicitly Rejected by this Court in *Brentwood* and This Court Should Review the Holding Below to Insure that *Brentwood* is Properly Applied by the Lower Federal Courts

The Fourth Circuit below utilized a test for state action which this Court specifically rejected in *Brentwood*. It continued to rigidly apply a four or three part test and rejected a finding of state action because it found that the facts did not neatly fall within those tests. But this Court in *Brentwood* established a flexible, fact-specific approach to state action analysis. The key question in every case is whether the actions complained of are sufficiently "entwined" with governmental power to invoke constitutional restraints and requirements. State action will be found a private party's actions are "'entwined with governmental policies'" or when government is 'entwined in [the party's] management or control,'" 121 S.Ct. at 930. But

there are no rigid categories to apply, as the Court of Appeals did. "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action." 121 S.Ct. at 930.

The question to be examined is whether there is sufficient involvement of state institutions or sufficient utilization of governmental power in the acts complained of so that the private acts complained of should be attributed to the State and the protections of the Constitution invoked.

The so-called "public function" test or the "close nexus test" or the "traditionally the exclusive prerogative of the state" test, which the Court of Appeals rigidly invoked, are not to be mechanically applied. This Court explained: "These arguments [as to the application of the other criteria] are beside the point, simply because the facts justify a conclusion of state action under the criterion of entwinement, *a conclusion in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts*." 121 S.Ct. at 934 (emphasis added).

Even if the facts would not lead to a conclusion of state action under any one of the other "tests," state action could still be found if state power or authority was entwined with the acts at issue. "Facts that address any of these criteria are significant, but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts

might not loom large under a different test." 121 S.Ct. at 934.

There is no doubt that in this case there was sufficient "entwinement" under the *Brentwood* rule so that the actions complained of constitute state action. In this case, there was "pervasive entwinement to the point of largely overlapping identity." The Citadel is state-created, state-supported, state-financed, state-operated and regulated, and the school performs an important governmental function, namely creating "citizen soldiers." Congress has afforded special status to The Citadel by passing special laws protecting its privileged position in comparison to other schools run on a military model or containing R.O.T.C programs. Thus under the Senior Reserve Officers' Training Corps (the Senior "ROTC") Act, *see* 10 U.S.C.A. § § 2101 to 2111b (West 1998 & Supp.2000), The Citadel and five additional civilian colleges are designated as "senior military colleges," recognized for the quality of the military leaders they produce, *see* 10 U.S.C.A. § 2111a(f). As such, Congress has provided that active duty military officers may be designated to serve as the Commandant or Assistant Commandant of the college and to serve as instructors and tactical officers under certain circumstances, *see* 10 U.S.C.A. § § 2111a(a)-(c), and students who graduate from senior military colleges are guaranteed active duty assignments in the military upon graduation if they desire such service, are otherwise qualified medically and physically, and are recommended for such duty by their ROTC professors of military science at the college, *see* 10 U.S.C.A. § 2111a(e).

Furthermore, the very acts complained of in this case were accomplished because of the invocation

of power granted to Respondents by the State. This is not a case where one student physically assaulted another student in the barracks, and no aspect of state power was involved. The only reason respondents were able to inflict the injury that occurred was because school regulations granted all upper class cadets special disciplinary power over fourth class "knobs" that required them to stand at attention and obey the orders of any cadet above them in grade. Thus when Respondent Saleeby had Ms. Mentavlos' sweatshirt set on fire and she attempted to put out the fire with her hands, he ordered her to stop doing so. Saleeby told her that he did not give her permission to move. Saleeby then directed another cadet to again set fire to Petitioner's clothes. This time, she did not move. As the flames grew, Saleeby used his foot to put out the fire. But for the power given to him by state regulations, this incident could not have happened. See 85 F.Supp.2d at 612; 46a.

As this Court noted in *Brentwood*, the State's fingerprints are all over this case. "Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it." 121 S.Ct. at 933. The Court below erred in applying a test which this Court explicitly rejected in *Brentwood*, and necessarily arrived at a wrong conclusion.

II. This Court Should Review The Lower Court's Holding that State Action Cannot be Found Unless the State Authorized the Actions Complained of.

Another serious error made by the Court below

was its holding that state action cannot be found since the harassing physical actions taken against Petitioner were not authorized by the state. "Anderson and Saleeby, by virtue of their status as college juniors at The Citadel, were asked and expected to assist in the instruction and correction of freshmen cadets in the applicable rules of The Citadel, but *were expressly prohibited* from engaging in any actions which could be considered hazing or otherwise abusive of the freshmen students." 249 F.3d at 322; 37a. (emphasis added). The Court further noted that: "They were students at a state-supported college, acting in a manner *proscribed by The Citadel* and known by Mentavlos to be violative of the applicable rules. Under these circumstances, their actions cannot in law or fairness be attributed to the State of South Carolina." 249 F.3d at 322; 38a (emphasis added).

But the requirement that the actions complained must have been ordered or authorized by the State for state action to be found has been consistently rejected by this Court since 1941. It is well established that a person acts "under color of law" if the person charged as a state actor exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state," see *United States v. Classic*, 313 U.S. 299, 326 (1941). See also *Screws v. United States*, 325 U.S. 91 (1945) (sheriff acted "under color of law" when he killed prisoner in his care even though state law prohibited what he was doing; still utilizing power granted by state); *Monroe v. Pape*, 365 U.S. 167, 171 (1961)(Section 1983 claim will lie against "those who carry a badge of authority . . .whether they act in accordance with their authority or misuse it.")

The Fourth Circuit repeated this error in response to Respondents argument that students at a school could never be considered state actors. Petitioner pointed out that in recent school prayer cases, students conducting prayer at football games were held to be "state actors" in part because the school authorities gave them authority to offer either a religious or non-religious invocation or message at the games. But this Court concluded that the religious messages could not be considered private speech because the messages were authorized by government policy, took place on government property at government-sponsored school-related events and were endorsed and encouraged by the school district. *See Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000). The Fourth Circuit commented that "to the extent *Santa Fe* has application to the claim before us, it is readily distinguishable because The Citadel did not authorize its students to engage in the challenged harassing actions, and did not endorse or encourage them to do so. The Citadel, on the contrary, expressly prohibited acts of this nature." 249 F.3d at 323; 38a.

This Court held in numerous Section 1983 cases that under some circumstances, private parties may be considered state actors. See cases cited in *Brentwood*, 121 S.Ct. at 930-32. But this Court has never held that state action requires a showing that a private actor acted with the approval or authorization of the State. Such a requirement would totally undermine the concept of state action for private entities or persons. By definition, state law does not sanction or authorize unconstitutional action. Under the Fourth Circuit's theory, a prisoner could never rely on Section 1983 to sue a private doctor who was engaged by contract to treat state prisoners since the

state authorization that permitted him to act required him to obey constitutional mandates. But this Court came to the opposite conclusion in *West v. Atkins*, 487 U.S. 42 (1988).

If the state deputizes a non-law enforcement individual to arrest a fugitive or a prison gives an trustee inmate authority over other inmates and they misuse that authority, there is no doubt state action could be found. See *e.g. Scott v. Vandiver,* 476 F.2d 238 (4th Cir.1973)(deputized individuals sued under Section 1983 for using excessive force); *Wilkerson v. Sarver*, 72 F.R.D. 605 (E.D. Ark. 1976)(trustee guard sued for shooting inmate). In these cases, the "state actors" misused the authority given to them, yet a Section 1983 claim would lie. This case presents exactly the same situation.

III. The Court Below Erred in Holding that Training Citizen Soldiers in a Strict Military Environment is Not a Traditional State Function

The Court of Appeals also rejected the argument that the strict military training system in force in The Citadel was insufficient to serve as a basis for finding state action. The Court agreed that "we have little trouble accepting that training civilians who have enlisted in the military for military service is fairly characterized as a traditionally sovereign power. However, The Citadel, unlike the military service academies, is not in the business of training soldiers for military service." 249 F.3d at 314; 21a. Its role is more modest: "[Although] The Citadel utilizes a military-style environment, its stated mission is 'to educate male undergraduates as members of the South

Carolina Corps of Cadets and to prepare them for post-graduate positions of leadership.'" *Id.* It described The Citadel system as similar to R.O.T.C. programs throughout the country or to military-style secondary schools.

The Court rejected the argument that the special educational system in effect at The Citadel and the special status afforded by Congress to the senior military colleges as a result of the special training did not change the analysis. Once again, it applied the Circuit's strict analysis of the state action test, noting:

> But, this is insufficient to support a finding of state action. Whereas state action may been found "in the exercise by a private entity of powers traditionally exclusively reserved to the State," . . . the "public function test is so carefully confined" that it "has been found in only narrow circumstances," citing *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 348 (4th Cir.2000) (internal quotation marks omitted). *See also DeBauche* [*v. Trani*, 191 F.3d 499, 508 (4th Cir.1999)] 191 F.3d at 508 (noting that the public function "category is very narrow"). "[T]he relevant question is not simply whether a private group is serving a public function," but whether "the function performed has been traditionally the *exclusive* prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); . . . Consequently, it cannot fairly be said that Congress, by affording a senior military college and its cadets certain legislative benefits, delegated a traditional, exclusive governmental function to The Citadel or to its non- enlisted, non-military student cadets. 249 F.3d at 317; 28a.

But this Court rejected this "narrow category" analysis in *Brentwood.* And furthermore it no longer speaks of activities that are the "exclusive prerogative of the state." In *Brentwood*, this Court noted that: "We have treated a nominally private entity as a state actor when it is controlled by an 'agency of the State,' . . . [or] when it has been delegated a public function by the State, . . . " 121 S.Ct. at 930.

Lower courts have noted that among the "public functions" that satisfy the state action test are fire fighting, *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000)(companies obtained state funds and performed exclusive state functions); operating a prison, see *Plain v. Flicker*, 645 F.Supp. 898, 907 (D.N.J. 1986)("[I]f a state contracted with a private corporation to run its prisons, it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine"); *Skelton v. Pri-Cor, Inc*, 963 F.2d 100 (6th Cir. 1991)(private corporation operating prison was state actor); or law enforcement, *Scott v. Vandiver,* 476 F.2d 238 (4th Cir.1973) (two county employees deputized by a local sheriff could be "state actors" for purposes of § 1983 where they misused the law enforcement power granted by state law by utilizing excessive force in trying to arrest an innocent person.

It would appear that training persons for the military should fall in the same category. The type of military training adopted at The Citadel and the special status afforded the institution by Congress places it in a unique status, similar to the service academies, and thus subject to Constitutional constraints.

That was the assumption made by the Fifth Circuit in the only reported case discussing the special status of the "senior military colleges" and the state action doctrine. *Alton v. Texas A&M University*, 168 F.3d 196, 199 (5th Cir. 1999). It noted with respect to the cadet defendants:

> Neither side disputes that the defendant officials are state actors. The student cadet leaders of the Corps are vested with authority over the less senior cadets and serve as a link in the chain of command between a freshman, like Alton, and the officials who oversee the Corps. Considering this authority and *the unique paramilitary structure of the A & M Corps of Cadets,* the student cadet leaders in this particular situation were arguably acting under color of state law. We will assume so, although we need not pause to decide this point, given our ready disposition of the appeal on grounds we will explain. (emphasis added).

This is also the conclusion of law review comment on this issue.

> The private schools' provision of both education and military training should qualify them as state actors. Training individuals to protect America domestically and abroad is one of the government's most important and essential functions. Although courts have not considered whether military training is a public function, courts have found the private performance of military and public protection functions to be state action. Therefore, private military schools which provide military training are performing a public function.

Marcia Berman "An Equal Protection Analysis of Public and Private all_Male Military Schools," 1991 *Univ. of Chic. Legal Forum* 211, 228, 229 (1991).

IV. This Court Should Review the District Court's Conclusion That There Was No Gender Motivated Harassment by Cadet Saleeby

On summary judgment, the District Court found sufficient evidence to uphold an equal protection claim against Cadet Anderson, but found insufficient evidence to uphold the equal protection claim against Cadet Saleeby. The Fourth Circuit never reached that issue. See 249 F.3d at 323, fn 8; 40a.

The courts have held that the harassing treatment of a female by a state actor is an equal protection violation if motivated by an intent to injure or annoy her because of her gender. Even if actions taken by state official standing alone did not deprive a citizen of constitutionally-protected due process rights, if the actions are undertaken with a discriminatory purpose to injure a person because of some class-based characteristic, an equal protection violation will be found.

However, it is undisputed that the fire incident involved setting Cadet Saleeby setting fire to Ms. Mentavlos at her waist, close to her breasts, presumably so that her undergarments would show through. When she tried to put out the fire with her hands, he ordered her not to do so. It is difficult to find no gender-based discrimination by such action, certainly not on a motion for summary judgment. This Court should review that finding.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision and judgment of the Fourth Circuit.

Dated: August 1, 2001

Leon Friedman
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Counsel of Record

Richard A. Harpootlian
Federal I.D. No. #1730
1410 Laurel Street
Columbia S.C. 29202
(803) 252-4848

Attorneys for Petitioner

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

Jeanie MENTAVLOS, Plaintiff-Appellant,
v.
John Justice ANDERSON; James Saleeby,
Defendants-Appellees,

The Citadel, The Military College of South Carolina,
Defendant-Amicus Curiae,
and
The Board of Visitors of the Citadel, The Military
College of South Carolina;
Richard Ellis, Captain; Nicholas Belcher; Eric
Amhaus; Edward Bohm,
Defendants,

No. 00-1331.

Argued Jan. 25, 2001.
Decided May 7, 2001.

Affirmed.

Before WILLIAMS and TRAXLER, Circuit Judges, and RAYMOND A. JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

TRAXLER, Circuit Judge:

Today we consider the novel question of whether two

male cadets at The Citadel, a state-supported and formerly all-male military college located in Charleston, South Carolina, acted "under color of" state law, within the meaning of 42 U.S.C.A. § 1983 (West Supp.2000), when they allegedly engaged in gender-based harassment and discrimination designed to force a female cadet to withdraw from the college. We hold that they did not, and accordingly affirm the district court's grant of summary judgment to the male cadets.

I.

The Citadel, The Military College of South Carolina, is a state-supported, four-year comprehensive college, established by the State of South Carolina in 1842. For over 150 years, The Citadel only admitted men to its full- time, residential student body known as the South Carolina Corps of Cadets. However, in the waning days of an extended legal battle over the constitutionality of the single-gender admissions policy of the Corps of Cadets, *see* *Faulkner v. Jones*, 10 F.3d 226 (4th Cir.1993) (discussing Shannon Faulkner's challenge to The Citadel's revocation of her admission to the Corps of Cadets based on her gender), and in the wake of the Supreme Court's decision in *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (holding that a similar, unconstitutional male-only admissions policy at Virginia Military Institute could not be remedied with a parallel women's program at a women's college), The Citadel was forced to abandon its male-only policy and began voluntarily admitting women to its Corps of Cadets in the fall of 1996. *See* *United States v. Jones*, 136 F.3d 342, 345 (4th Cir.1998). [FN1]

FN1. Faulkner, the first female admitted to The Citadel Corps of Cadets, joined the Corps on August 12, 1995, by virtue of court order, but withdrew because of illness on August 18, 1995. *See United States v. Jones*, 136 F.3d 342, 345 (4th Cir.1998).

Appellant Jeannie Mentavlos was one of four women admitted to The Citadel that fall. Upon her arrival, she was assigned to Echo Company, an administrative unit of the Corps of Cadets. However, she withdrew from the college in December 1996. Mentavlos contends that during those four months the commanding administrative officer and several upperclass cadets assigned to Echo Company successfully conspired to perpetuate the former all-male Corps of Cadets by driving her from the school. Mentavlos further asserts that, to accomplish this result, the men subjected her to "sexual harassment, intimidation, and abuse" in the form of "insults, indignities, physical assaults and humiliating treatment, which went far beyond any need to toughen, strengthen or acclimate [her] to the rigors of military discipline." J.A. 25-26.

The following year, Mentavlos instituted this action against The Citadel and its governing Board of Visitors; Captain Richard Ellis, the army officer assigned to act as the commanding administrative officer of Echo Company; and five upperclass cadets assigned to Echo Company, including Appellees John Justice Anderson and James Saleeby. Among other claims, Mentavlos alleged that the actions of Ellis and the individual cadets deprived her of her constitutional right to equal protection in violation of 42 U.S.C.A. §

1983 and 42 U.S.C.A. § 1985 (West 1994), and that The Citadel and The Board of Visitors violated Title IX of the Educational Amendments of 1972, *see* 20 U.S.C.A. § 1681 (West 2000), by failing to adequately respond to the known, gender-based harassment which ultimately forced her to withdraw from the school.

With the exception of one cadet who was in default, all defendants moved for summary judgment and all but Cadets Anderson and Saleeby settled the claims against them. Although Mentavlos had originally alleged only that the upperclass cadets acted in concert with Captain Ellis, a state actor for purposes of § 1983, to abuse and harass her because of her gender, she was subsequently allowed to amend her complaint to allege that the individual cadets were also state actors and elected to proceed solely on her § 1983 claim against them. Anderson and Saleeby then moved for summary judgment on the additional ground that they did not act "under color of" state law for purposes of § 1983.

After conducting a fact-finding hearing on the state-actor issue with the consent of the parties, the district court granted summary judgment to Anderson and Saleeby on the grounds that they did not act under color of state law and, therefore, could not be held liable under § 1983 for the alleged violations of Mentavlos' constitutional rights. With regard to Saleeby, the district court granted summary judgment on the alternative ground that Mentavlos failed to prove that his actions were discriminatory in nature. *See Mentavlos v. Anderson*, 85 F.Supp.2d 609, 628 (D.S.C.2000). The district court then certified the case as one appropriate for immediate appeal under 28 U.S.C.A. § 1292(b) (West 1993). [FN2] We

consented to hear the appeal.

FN2. Because one cadet had defaulted, a damages hearing was still pending against him.

II.

A.

We review *de novo* the district court's grant of summary judgment to Appellees Anderson and Saleeby. *See* Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 340 (4th Cir.2000), *cert. denied*, 121 S.Ct. 882, 121 S.Ct. 1096 (2001). Like the district court, we review the disputed evidence concerning Appellees' alleged gender-based harassment of Mentavlos in the light most favorable to her. *See* Mentavlos, 85 F.Supp.2d at 612; Goldstein, 218 F.3d at 341. However, the district court's factual findings regarding the state-actor issue, made with consent of the parties, are reviewed for clear error. *See* Fed.R.Civ.P. 52(a); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va., 135 F.3d 275, 284 (4th Cir.1998). "A finding is clearly erroneous when, although there is evidence to support it, on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed." Faulconer v. Commissioner, 748 F.2d 890, 895 (4th Cir.1984).

B.

The facts of this case are exhaustively laid out in the district court's opinion. *See* Mentavlos, 85 F.Supp.2d at 610-20. As a military college, The Citadel offers a

unique educational experience to its students. Members of the Corps of Cadets are subjected to military style rules and living conditions, and Citadel freshmen in particular are subjected to a strict set of disciplinary and behavioral rules known as the "Fourth Class System." Under this system, described at length in the Cadet Regulations (the "Blue Book"), faculty and active duty military personnel assigned to the school mentor and supervise upper-class cadets, who in turn mentor and supervise those cadets below them. The Citadel expects from its cadets "strict and unquestioning obedience, mental and physical toughness, and mature tolerance of confrontation" and offers "an intense, high-stress experience designed to facilitate development of 'The Whole Man.' " Supp. J.A. 413. For example:

> Freshmen must come to attention whenever an upperclassman enters their barracks or speaks to them. Freshmen are allowed only very limited, formal responses to upperclassmen: "yes Sir;" "no Sir;" "no excuse, Sir;" and "request permission to make a statement, Sir." When outside their own room or classroom, they are generally required to move briskly (walk at 120 steps per minute) or to stand at attention. Freshmen are prohibited from using a number of common areas. The freshmen are required to spend time in drill and in performing company details such as cleaning the common areas of the barracks. They are required to follow detailed and restrictive procedures at meals and to memorize and recite certain factual information at meals and other times.

Mentavlos, 85 F.Supp.2d at 617 (internal citations omitted). Day-to-day functioning of the fourth class system is dependent upon the cadet chain of command. Specifically,

> [t]raining, counseling, and inspecting fourth classmen is restricted to the chain of command. Correcting and reporting fourth classmen is the responsibility of all cadets and officers associated with The Citadel who may observe an infraction on the part of a fourth classman.
> Supp. J.A. 415.

Thus, under the fourth class system, upperclass cadets are given limited authority to correct and report violations or infractions of The Citadel's rules by fourth classmen (freshmen), with day-to-day functioning overseen by the Cadet Regimental Commander, a cadet senior. However, active duty military officers assigned to the school as faculty teach, advise, and mentor cadet leaders in the implementation of the fourth class system and the ultimate responsibility for enforcement of the fourth class system rests with The Citadel Commandant, not with upperclass cadets. Formal discipline is initiated through performance reports, which "may be submitted by an officer of The Citadel Faculty or Staff, cadet rank holders, members of the Cadet Guard, and by any cadet on himself, when directed by proper authority." Supp. J.A. at 395. The cadet company commander may note the punishment for "Class III" offenses which have assigned penalties, and may recommend a punishment for certain other "Class II" offenses. [FN3] But, with the exception of the most minor Class III infractions, the ultimate responsibility for administering the disciplinary system and imposing punishment rests with the Commandant or Assistant Commandant.

FN3. By way of example, Class III offenses

include absence from class, required formation, guard mount, tours confinements, restrictions, or all-in. Class II offenses include absence from guard post or a required event (such as a parade, athletic event, drill, or mandatory meal).

In contrast to this limited authority granted to upperclass cadets to correct minor infractions of school rules, the Blue Book expressly prohibits discrimination on the basis of gender or other impermissible criteria, including sexual harassment, and provides a specific procedure for reporting such complaints to The Citadel faculty. Any action that might be deemed hazing or abusive treatment of a freshman, regardless of whether it is -gender- motivated, is also strictly prohibited. "Hazing is defined as striking, offering bodily harm, treating with violence, verbal abuse or any treatment of a tyrannical, abusive, or humiliating nature by a member of a higher class to a member of a lower class" and "includes requiring performance of personal service or humiliating verbal abuse." Supp. J.A. 414. Upperclass cadets are also expressly prohibited from "touch[ing] a fourth class cadet (male or female) without first asking permission and stating the specific area(s) that will be touched." Supp. J.A. 414. Even then, touching is allowed to occur only in an open area in full view of at least one other cadet and "only for the purpose of providing instruction or correcting a uniform or posture discrepancy." Supp. J.A. 414.

Anderson and Saleeby were upperclass cadets, juniors holding the rank of sergeant, assigned to Echo Company with Mentavlos in the fall of 1996. Viewing the evidence in the light most favorable to Mentavlos,

the district court found that Mentavlos had produced evidence which, if believed, would show that Anderson and Saleeby were each involved in three alleged incidents of improper treatment of her during that fall. With regard to Saleeby, the district court found sufficient evidence to show that Saleeby (1) kicked Mentavlos in the legs on one or more occasions, but caused no bruising, and commented that Mentavlos " 'likes to be kicked' "; (2) came into Mentavlos' room wearing only non-uniform gym shorts and shower-type shoes on one occasion, although Mentavlos did not interpret the visit as being sexual in nature; and (3) directed another cadet to set Mentavlos' sweatshirt on fire while she was wearing it on one occasion, and then used his foot to put it out before it burned her skin. *Mentavlos*, 85 F.Supp.2d at 612-13. With regard to Anderson, the district court found sufficient evidence to show that Anderson (1) pushed cardboard into Mentavlos' face while ranting and raving at her because she smiled while standing at attention, which left welts under her chin that lasted for one or two days; (2) may have treated Mentavlos differently from two male cadets when Mentavlos and another female cadet were caught drinking alcoholic beverages just before the Thanksgiving break; and (3) threatened Mentavlos at various times, stating that he would physically harm or kill her or her brother, who was an upper-class cadet at The Citadel. *See id.* at 613.

The district court found that upperclass cadets Anderson and Saleeby "had at least some measure of authority over [Mentavlos] by virtue of the system created and sanctioned by The Citadel, a state institution." *Id.* at 619. And, the district court found that it was not uncommon in this military-type environment for mild harassment to take place, "either

verbally or by requiring the freshmen to engage in an activity not of the freshman's choosing (*e.g.*, spending long periods of time polishing a given item)." *Id.* at 617. However, the district court also found that the school recognized the risks and history of abuse of the fourth class system, had made efforts to manage those risks, and clearly "did not endorse or encourage abuses of the fourth class system." *Id.* at 619. On the contrary, the district court noted that The Citadel had, "in fact, endeavored to discourage abuses of the type alleged by" Mentavlos. *Id.*

Each of the alleged incidents involving Anderson and Saleeby would constitute a violation of the written policy of The Citadel. On this point, there appears to be no serious disagreement. Indeed, Mentavlos reported the cardboard and "boxer shorts" incidents when they occurred, resulting in Anderson being disciplined and all cadets, including Saleeby, being reminded of the rules of proper attire. Mentavlos did not voice any other complaints until just before withdrawing from The Citadel in December, in part due to a reasonable concern that the male cadets might retaliate against her with more harassment. Once reported, however, The Citadel administration conducted thorough investigations and imposed substantial punishments. Anderson and Saleeby, as well as other cadets, were effectively placed on house arrest during the investigations; Saleeby faced a commandant's board and was suspended from school for one year; and Anderson, rather than face a commandant's board, resigned from The Citadel, thereby precluding his return to the school. Consequently, the district court found that Anderson and Saleeby's abuses "were punished or adequately addressed when brought to the school's attention" and

that "the discipline imposed and responses given were within a reasonable range of discretion to preclude any inference that the school endorsed or condoned the alleged behaviors." *Id.*

III.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. § 1983. In order to establish a claim under § 1983, Mentavlos must prove two elements: (1) that Anderson and Saleeby "deprived [her] of a right secured by the Constitution and laws of the United States;" and (2) that they "deprived [her] of this constitutional right under color of [State] statute, ordinance, regulation, custom, or usage." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (internal quotation marks omitted).

"Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.' " *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)); *see Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (holding that § 1983's requirement that a

defendant act under "color of law" is treated as the *equivalent to the "state action" requirement* under the Fourteenth Amendment); *Haavistola v. Community Fire Co.*, 6 F.3d 211, 215 (4th Cir.1993) (same).

> The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.' " *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (quoting *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)). "This fundamental limitation on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.' " *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (quoting *Lugar*, 457 U.S. at 936-37, 102 S.Ct. 2744).

Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 658 (4th Cir.1998).

Nevertheless, "the deed of an ostensibly private organization or individual" may at times demand to be treated "as if a State has caused it to be performed." *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924, 930, 148 L.Ed.2d 807 (2001). Specifically, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' " *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)); *American Mfrs.*, 526 U.S. at 50, 119 S.Ct. 977 when applying § 1983 to a

private actor, " 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.' " (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

A determination of "whether [a private party's] allegedly unconstitutional conduct is fairly attributable to the State," American Mfrs., 526 U.S. at 50, 119 S.Ct. 977, requires us to "begin[ ] by identifying 'the specific conduct of which the plaintiff complains,' " id. at 51, 119 S.Ct. 977 (quoting Blum, 457 U.S. at 1004, 102 S.Ct. 2777). The inquiry is "necessarily fact-bound." Lugar, 457 U.S. at 939, 102 S.Ct. 2744.

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Brentwood, 531 U.S. 288, 121 S.Ct. at 930; *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (noting that it is an " 'impossible task' " to "fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause"); Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir.1984) (recognizing that "[t]here is no precise formula to determine whether otherwise private conduct constitutes 'state action.' ").

Nevertheless, several factors or circumstances bearing upon the issue of whether private conduct "can

fairly be attributed to the State" for purposes of § 1983 liability have been clearly delineated by precedent. *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777. Of particular relevance here, the Supreme Court has held that challenged activity may be found to be state action where "the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' " *American Mfrs.*, 526 U.S. at 52, 119 S.Ct. 977 (quoting *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777); *see also Brentwood*, 531 U.S. 288, 121 S.Ct. at 930. And, "the required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Blum*, 457 U.S. at 1005, 102 S.Ct. 2777 (quoting *Jackson*, 419 U.S. at 353, 95 S.Ct. 449); *see also American Mfrs.*, 526 U.S. at 55, 119 S.Ct. 977; *Brentwood*, 531 U.S. 288, 121 S.Ct. at 930 ("We have treated a nominally private entity as a state actor ... when it has been delegated a public function by the State." (citing *West v. Atkins*, 487 U.S. 42, 56, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)); *Goldstein*, 218 F.3d at 348 (holding "that when it has been established that the State has empowered, or is permitting, a private actor to homestead on territory that has heretofore been the exclusive, traditional province of the State, there need be no specific demonstration of a nexus to the alleged constitutional violation").

Although not directly pertinent to the state action inquiry here, state action has also been found in circumstances where the private actor operates as a " 'willful participant in joint activity with the State or its agents,' " *Brentwood*, 531 U.S. 288, 121 S.Ct. at 930

(quoting *Lugar*, 457 U.S. at 941, 102 S.Ct. 2744), or when "a nominally private entity ... is controlled by an 'agency of the State,' " *id.* (quoting *Pennsylvania v. Board of Dirs.*, 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957)) (per curiam) (holding that state agency acting as a trustee for a private trust violated the Fourteenth Amendment when it refused to allow admission of black applicants to a college in accordance with the private trust that created it); *see also Evans v. Newton*, 382 U.S. 296, 302, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (holding that park established for the use of only white persons by a private trust must be treated as public institution for purposes of the Fourteenth Amendment). And, state action has been found where a private entity is entwined with governmental policies or the government is entwined in the management or control of a private entity. *See Brentwood*, 531 U.S. 288, 121 S.Ct. at 927 (holding that the regulatory activity of a private, statewide athletic association "should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association."); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) (holding that Amtrak, a corporation created and controlled by the government, would be considered an agency or instrumentality of the government for purposes of individual constitutional rights); *Evans*, 382 U.S. at 299, 86 S.Ct. 486 ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").

Finally, we note that even the presence of these circumstances or factors might not be conclusive of the

state action issue because "facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances." *Brentwood*, 531 U.S. 288, 121 S.Ct. at 934; *see Polk County v. Dodson*, 454 U.S. 312, 323 n. 13, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (holding that actions of a public defender employed by the State were private despite public employment because a public defender does "not ac[t] on behalf of the State; he is the State's adversary").

IV.

On appeal, Mentavlos contends that the district court erred in concluding that Anderson and Saleeby did not act under color of state law when they allegedly harassed and abused her because of her gender. Specifically, Mentavlos contends that the district court applied the wrong test for state action, and that we should conclude that the challenged actions are fairly attributable to the State, and therefore were taken under color of state law, because (1) training civilians for the military in a rigorous military environment is a traditional governmental function, and (2) the cadets were acting pursuant to the disciplinary authority bestowed upon them by the rules, regulations, and customs of The Citadel, which receives substantial assistance, primarily financial in nature, from the State of South Carolina. We address each contention in turn.

A.

We begin with Mentavlos' assertion that the district court applied the wrong test for state action because the court cited to the "state action" criteria described

by this court in *Haavistola v. Community Fire Company*, 6 F.3d 211 (4th Cir.1993), in rendering its decision. According to Mentavlos, this was error because *Haavistola* has now been overruled, albeit implicitly, by our decision in *Goldstein v. Chestnut Ridge Volunteer Fire Company*, 218 F.3d 337 (4th Cir.2000). We disagree. [FN4]

> FN4. We note the compelling counter-argument that a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting *en banc* can do that. *See Bell v. Jarvis*, 236 F.3d 149, 159 (4th Cir.2000) (en banc). We simply do not read *Goldstein* as an attempt to do so.

Although " 'cases deciding when private action might be deemed that of the state have not been a model of consistency,' " *Lebron*, 513 U.S. at 378, 115 S.Ct. 961 (quoting *Edmonson*, 500 U.S. at 632, 111 S.Ct. 2077 (O'Connor, J., dissenting)), the critical inquiry has remained constant. After examining the relevant facts and circumstances, "the inquiry in each case is whether the conduct is fairly attributable to the state." *Arlosoroff*, 746 F.2d at 1021; *see also Burton*, 365 U.S. at 722, 81 S.Ct. 856; *United Auto Workers, Local #5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir.1995) ("The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described in all fairness as a state actor." (internal quotation marks omitted)).

When determining whether challenged conduct is "fairly attributable" to the State, this court has, from precedents existing at the pertinent times and in light of the specific facts before it, defined various tests or factors which may be considered. For example, in *Andrews v. Federal Home Loan Bank*, 998 F.2d 214 (4th Cir.1993), we identified four circumstances under which the Supreme Court had held that a private party may be deemed a state actor for purposes of § 1983 liability:

> (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Id. at 217; *see also DeBauche v. Trani*, 191 F.3d 499, 507 (4th Cir.1999), *cert. denied*, 529 U.S. 1033, 120 S.Ct. 1451, 146 L.Ed.2d 337 (2000).

In *Haavistola*, another panel of this court summarized three situations in which conduct by a private entity could be fairly attributable to the state: (1) when a sufficiently close nexus exists between a regulated entity and a state such that the actions of the former are fairly treated as those of the state; (2) when the state "has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state"; and (3) "when the private entity has exercised powers that are traditionally the exclusive prerogative of the state." *Haavistola*, 6 F.3d at 215 (internal citations and quotation marks omitted).

Most recently, in *Goldstein*, we emphasized the fact-based nature of the state action inquiry, reiterating that "the state action determination requires an examination of all the relevant circumstances, in an attempt to evaluate the degree of the Government's participation in the private party's activities." *Goldstein*, 218 F.3d at 342 (internal quotation marks omitted). There, we identified several considerations which are pertinent to the inquiry: (1) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority"; (2) "the extent and nature of public assistance and public benefits accorded the private entity"; (3) "the extent and nature of governmental regulation over the institution"; and (4) "how the state itself views the entity, *i.e.*, whether the state itself regards the actor as a state actor." *Id.* at 343 (internal quotation marks omitted). Like its predecessors in this circuit, however, the *Goldstein* decision summarized considerations already set forth by precedent, and did not purport to overrule our prior precedents or espouse new areas of inquiry. Indeed, *Haavistola* summarized the standard set forth by the Supreme Court in *Blum*, 457 U.S. at 1004-05, 102 S.Ct. 2777, *see* *Haavistola*, 6 F.3d at 215, which is still relied upon by the Court today, *see* *Brentwood*, 531 U.S. 288, 121 S.Ct. at 930.

Accordingly, we reject Mentavlos' assertion that *Haavistola* was overruled by *Goldstein* and, as a consequence, that the district court applied an incorrect test to the facts before it. Like our colleagues in prior panel decisions, we are guided in this complex area by the factors which have been described by the Supreme Court in prior precedents and which are pertinent to the circumstances of this case. Thus, we turn to the

ultimate inquiry before us: Is there a sufficiently "close nexus" between the challenged actions of Anderson and Saleeby and the State of South Carolina such that their actions " 'may be fairly treated as that of the State itself.' " *Brentwood*, 531 U.S. 288, 121 S.Ct. at 930 (quoting *Jackson*, 419 U.S. at 351, 95 S.Ct. 449).

B.

We begin with Mentavlos' claim that the actions of The Citadel cadets were taken "under color of" state law because the State has delegated to The Citadel and its Corps of Cadets " 'powers traditionally exclusively reserved to the State.' " *See American Mfrs.*, 526 U.S. at 55, 119 S.Ct. 977 (quoting *Jackson*, 419 U.S. at 352, 95 S.Ct. 449). Specifically, Mentavlos asserts that The Citadel is in the business of serving the traditional governmental function of training civilians for the military in a rigorous military environment much like the United States service academies-- Westpoint, the Naval Academy, and the Air Force Academy. Because cadets at military academies have been considered to be "in the military" for purposes of the *Feres* doctrine, *see Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (holding that military personnel may not bring suit under the FTCA for injuries sustained in the course of military service); *see also Collins v. United States*, 642 F.2d 217, 220-21 (7th Cir.1981) (applying *Feres* doctrine to a cadet at Air Force Academy), the argument goes, we should hold that student cadets at The Citadel are "in the military" for purposes of the color-of-state-law requirement of § 1983.

1.

Like the district court, we find Mentavlos' proffered analogy to military service academies and their cadets to be untenable. We recognize that "[o]ne of the paradigmatic means by which a private party becomes subject to section 1983 is through the government's conferral upon that party of what is, at core, a sovereign power." *Gaston*, 43 F.3d at 906. And, we have little trouble accepting that training civilians who have enlisted in the military for military service is fairly characterized as a traditionally sovereign power. However, The Citadel, unlike the military service academies, is not in the business of training soldiers for military service.

Although The Citadel utilizes a military-style environment, its stated mission is "to educate male undergraduates as members of the South Carolina Corps of Cadets and to prepare them for post-graduate positions of leadership through academic programs of recognized excellence supported by the best features of a structured military environment." Supp. J.A. 346. In other words, the mission of The Citadel is to educate civilian students and produce community leaders, which has never been held to be the exclusive prerogative of a State. *Cf. Rendell-Baker*, 457 U.S. at 842, 102 S.Ct. 2764 (holding that education of maladjusted high school students, while a public function, is not one traditionally reserved to the states); *Arlosoroff*, 746 F.2d at 1021 (holding that the regulation of intercollegiate athletics is not a function traditionally, exclusively reserved to the state). Noticeably absent, of course, is a mission to train soldiers for the military.

Nor does the Citadel's use of a military-style

environment fairly compel the conclusion that The Citadel has been delegated the sovereign function of training young men and women for the military. As part of its curriculum, The Citadel requires its Corps of Cadets students to participate in a Senior ROTC program. But, like other state-supported colleges, The Citadel is not a formal part of the United States military, nor are its students enlisted members of a military branch. As is the case with ROTC students at all civilian college campuses, Citadel students may enlist in the armed forces in conjunction with their ROTC training, but have no service commitment by virtue of their mere attendance at The Citadel. They are no more members of a military branch than students attending the other state-supported colleges and universities in South Carolina. As the district court aptly observed:

> [w]hile The Citadel bases its educational experience on a military model, the comparison to the [service] academies ends there. The education is no more at government expense than at any other state supported college. Neither do Citadel students incur a service obligation simply because they attend The Citadel. Most significantly, Citadel cadets are not members of the armed forces, unless they are members of the reserve as a consequence of signing a contract in a ROTC program. In that regard, Citadel cadets stand in no different position than an ROTC student at any other college, whether public or private.

Mentavlos, 85 F.Supp.2d at 622 (footnote omitted). The numbers confirm this fact: only two of 1800 students at The Citadel in 1996 were commissioned military officers (and those two only because they had attended an early commissioning program elsewhere) and it was stipulated that only about one- third of the

Corps of Cadets enters military service upon graduation. Furthermore, none of the cadets involved here (Mentavlos, Anderson, or Saleeby) held ROTC contracts. Consequently, we are not persuaded that The Citadel is analogous to the service academies of the United States military, or that it has otherwise been delegated the sovereign task of training soldiers for service in the military. [FN5]

> FN5. Mentavlos' reliance upon *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir.1982), does not counsel a different conclusion. In *Dobyns*, a private company engaged as a "peacekeeper," providing military protection in the Sinai for the federal government, was held to be a state actor. *See id.* at 1220. The Citadel and its cadets, of course, are not engaged in military protection, nor have the functions of military protection or military training been delegated to them by the state or federal governments.

For similar reasons, Mentavlos' reliance upon application of the *Feres* doctrine to cadets at the military service academies is inapt. In *Collins*, the Seventh Circuit applied the *Feres* doctrine to a United States Air Force Academy cadet. *See Collins*, 642 F.2d at 220. Air Force Academy cadets, however, were considered members of the Air Force by statute, subject to military discipline, and eligible for certain veterans' benefits. *See Collins*, 642 F.2d at 220-21. Unlike students accepted into one of the military service academies, who are on active duty in the military and will enter military service, students at The

Citadel may or may not enter military service upon the completion of their collegiate years. Simply stated, students at The Citadel are not "in the military," nor is there precedent which would lead us to a contrary result. [FN6]

> FN6. Mentavlos' reliance upon *Alton v. Texas A & M University*, 168 F.3d 196, 199-200 (5th Cir.1999), and *Wake v. United States*, 89 F.3d 53 (2d Cir.1996), is also misplaced. In *Alton*, the court assumed, but expressly did not decide, that students at Texas A & M, a military college similar to The Citadel, were state actors. *See Alton*, 168 F.3d at 199- 200. In *Wake*, a student of Norwich University, also a military college, was held subject to the *Feres* doctrine. *See Wake*, 89 F.3d at 62. However, the student was an enlisted member of the Navy Reserves, traveling in a Navy ROTC vehicle incident to military service when injured. *See id.* at 55-57.

Finally, Mentavlos' reliance upon *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), does not avail her. There, the Supreme Court described the mission of the Virginia Military Academy (VMI), a similar state military college, as "producing citizen soldiers." *Id.* at 541, 116 S.Ct. 2264. As an initial premise, we note that the mission of The Citadel makes no such reference to this military-type goal; rather, the stated mission of The Citadel is to produce community leaders, not soldiers. But, even if one of The Citadel's purposes was to train civilian soldiers and its upperclass cadets were

engaged in serving that purpose, it would not be enough to transform the individual students' actions into state action. Although military training of enlisted soldiers is a governmental function, military- type training of non-enlisted students at a state-supported college is a much different charge. There are numerous ROTC programs operating at public and private campuses all over this country, not to mention state supported and private academies and schools with junior ROTC groups, performing military-type training similar to that performed at The Citadel. As noted by the district court, there is "no significant distinction between what The Citadel does and what many private secondary schools do: using a military model as a basis for instilling discipline and providing leadership training." *Mentavlos*, 85 F.Supp.2d at 623. Consequently, the district court observed that,

> [u]nder [Mentavlos'] theory, every high school military academy would be engaged in an "exclusive state function." The long standing prevalence of such private institutions, demonstrates the non-exclusivity of military model training. Indeed, it would appear that most high schools based on a military model are private institutions, although Junior ROTC is offered at a number of public schools as a component of the educational offerings. In short, education and training based on a military model are not historically an exclusive state function.

Id. Therefore, we hold that the district court did not err in concluding that The Citadel cadets have not been cloaked by the State of South Carolina with sovereign powers traditionally reserved exclusively to the government.

Mentavlos also attempts to equate The Citadel to the military service academies because The Citadel and its cadets are entitled to certain special benefits conferred by the federal and state governments. Specifically, under the Senior Reserve Officers' Training Corps (the Senior "ROTC") Act, *see* 10 U.S.C.A. § § 2101 to 2111b (West 1998 & Supp.2000), The Citadel and five additional civilian colleges are designated as "senior military colleges," recognized for the quality of the military leaders they produce, *see* 10 U.S.C.A. § 2111a(f). [FN7] As such, Congress has provided that active duty military officers may be designated to serve as the Commandant or Assistant Commandant of the college and to serve as instructors and tactical officers under certain circumstances, *see* 10 U.S.C.A. § § 2111a(a)-(c), and students who graduate from senior military colleges are guaranteed active duty assignments in the military upon graduation if they desire such service, are otherwise qualified medically and physically, and are recommended for such duty by their ROTC professors of military science at the college, *see* 10 U.S.C.A. § 2111a(e). South Carolina also affords special consideration to certain persons affiliated with The Citadel, although not to the student cadets. It has provided that "[a]ll members of the board of visitors, administrative staff and faculty personnel of The Citadel, the Military College of South Carolina, shall be eligible to be commissioned officers in the unorganized militia of South Carolina." S.C.Code Ann. § 25-1-520 (Law.Co-op.1989).

FN7. The six Senior Military Colleges are Texas A & M University, Norwich University, The Virginia Military Institute, The Citadel, Virginia Polytechnic Institute and State

University, and North Georgia College and State University. *See* 10 U.S.C.A. § 2111a(f) (West 1998).

Mentavlos claims that because the United States Congress has recognized The Citadel as a "senior military college" entitled to certain federal benefits and because the South Carolina legislature has bestowed special consideration to it, the State of South Carolina would consider the actions of the cadets to be governmental action by the State itself. We disagree.

By legislation, Congress has provided that senior military colleges may be provided with military officers to serve in the college administration and that graduates of those colleges, if they so request, will be allowed to join and serve in the military as commissioned officers if otherwise qualified. At best, however, this legislation reflects recognition of the value of the military type experience provided by the colleges and, in that respect, The Citadel and its cadets may indirectly serve a governmental function. But, this is insufficient to support a finding of state action. Whereas state action may been found "in the exercise by a private entity of powers traditionally exclusively reserved to the State," *Jackson*, 419 U.S. at 352, 95 S.Ct. 449, the "public function test is so carefully confined" that it "has been found in only narrow circumstances," *Goldstein*, 218 F.3d at 348 (internal quotation marks omitted). *See also DeBauche*, 191 F.3d at 508 (noting that the public function "category is very narrow"). "[T]he relevant question is not simply whether a private group is serving a public function," but whether "the function performed has been traditionally the *exclusive* prerogative of the

State." *Rendell-Baker*, 457 U.S. at 842, 102 S.Ct. 2764 (internal quotation marks omitted); *see also Jackson*, 419 U.S. at 353, 95 S.Ct. 449; *Haavistola*, 6 F.3d at 216. Thus, "[t]he fact that a private entity performs a function which serves the public does not make its acts governmental action." *American Mfrs.*, 526 U.S. at 56, 119 S.Ct. 977 (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987)). Consequently, it cannot fairly be said that Congress, by affording a senior military college and its cadets certain legislative benefits, delegated a traditional, exclusive governmental function to The Citadel or to its non- enlisted, non-military student cadets.

Nor are we persuaded by Mentavlos' claim that the State of South Carolina would view Citadel cadets as state actors as a consequence of this legislative enactment. In the context of the traditional, exclusive governmental function test, "[a]nother factor relevant to the state action determination is how the state itself views the entity." *Goldstein*, 218 F.3d at 347; *see also Haavistola*, 6 F.3d at 218 (holding that the determination of "when a private entity assumes the role of state actor due to its involvement or provision of an exclusive public function ... hinges on how a given state itself views the conduct of the function by the private entity."). While not a dispositive factor, the fact that a state views a private entity as a state actor understandably "militates in favor of our finding of state action." *Goldstein*, 218 F.3d at 347. Mentavlos, however, points to nothing within the federal act which would support a conclusion that the State of South Carolina would consider Citadel students to be state actors, for whose actions the State should be held liable. And, the contention that the State of South

Carolina would consider The Citadel cadets to be state actors by virtue of a state legislative enactment according a special benefit, not upon the cadets, but upon employees and governing members of The Citadel, is plainly without merit.

C.

Mentavlos next contends that the actions of Anderson and Saleeby are "fairly attributable to the State," and therefore should be considered to have been taken under color of state law, because the State provides financial assistance to The Citadel and extensively regulates its military program. We disagree.

As noted previously, because Anderson and Saleeby are private students, they may not be held to constitutional standards unless there is a sufficiently "close nexus" between the State and their challenged actions such that "the latter may be fairly treated as that of the State itself." *American Mfrs.*, 526 U.S. at 52, 119 S.Ct. 977 (internal quotation marks omitted); *see Brentwood*, 531 U.S. 288, 121 S.Ct. at 930. The determination of "[w]hether such a 'close nexus' exists," in turn, "depends on whether the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' " *American Mfrs.*, 526 U.S. at 52, 119 S.Ct. 977 (quoting *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777). Action which is taken by private persons "with the mere approval or acquiescence of the State" is not sufficient to justify a holding that the action is state action. *American Mfrs.*, 526 U.S. at 52, 119 S.Ct. 977; *see also Flagg Bros. v. Brooks*, 436 U.S. 149, 164, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) ("This Court ... has

never held that a State's mere acquiescence in a private action converts that action into that of the State."). More than the mere adoption of " 'a passive position toward the underlying private conduct' " is required. *Goldstein*, 218 F.3d at 342 (quoting *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 615, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). Rather, we look for "indices of the Government's encouragement, endorsement, and participation" in the challenged actions. *Skinner*, 489 U.S. at 615-16, 109 S.Ct. 1402.

The district court found that Mentavlos failed to make this showing, noting that while the actions of Anderson and Saleeby "may have been made possible by the system established by the state," the "cadets did not receive significant encouragement and did not exercise the state's coercive powers" in so acting. *Mentavlos*, 85 F.Supp.2d at 625. We agree.

1.

We need not tarry long with Mentavlos' claim that Anderson and Saleeby were state actors for purposes of § 1983 because The Citadel, as a state-supported college, is governed by state officials whose powers are defined by statute and receives financial assistance and other support from the state. *See generally* S.C.Code Ann. § 59-101-10 (Law.Co- op.Supp.2000) (listing state-supported colleges and universities in South Carolina); S.C.Code Ann. § § 59-121-10 to 450 (Law. Co-op.1990 & Supp.2000) (statutes pertaining to the operation of The Citadel). While substantial state assistance is generally a factor to be considered in determining whether the state has coerced or significantly encouraged private action, *see Goldstein*, 218 F.3d at 347, a private party's dependence upon the

state for assistance, even if substantial, does not transform its actions into actions of the state, *see* *Rendell-Baker*, 457 U.S. at 840-41, 102 S.Ct. 2764 (holding that a private school's near total dependence upon the State for funds did not render its employee discharge decisions acts of the State); *Blum*, 457 U.S. at 1011, 102 S.Ct. 2777 (holding that similar dependence of nursing homes on state funds did not make the acts of its physicians and administrators acts of the State); *Goldstein*, 218 F.3d at 347 (the "receipt of state funds alone is insufficient to transform private actions into state actions" (internal quotation marks omitted)). In this case, The Citadel's receipt of state financial assistance renders it no different in any material respect from the other state-supported institutions of higher learning in the state. *See e.g.* S.C.Code Ann. § § 59-117-10 to 330 (Law. Co-op.1990 & Supp.2000) (statutes pertaining to the University of South Carolina); S.C.Code Ann. § § 59-119-10 to 1050 (Law. Co-op.1990 & Supp.2000) (statutes pertaining to Clemson University).

Mentavlos' claim in this regard, however, also fails on a more basic level. While state assistance provided to The Citadel might be pertinent to a determination of whether The Citadel is a state actor, that is not the issue before us. Nor, for that matter, does it appear to be a fact in dispute. Rather, this case involves the question of whether students who attend The Citadel, as opposed to The Citadel or its employees or administrators, are state actors for purposes of § 1983. The Citadel was created by and receives assistance from the state, as all state-supported colleges do, and its employees are paid by the state. But, Mentavlos has pointed to no special state assistance, financial or otherwise, which was provided to the students of The

Citadel, much less such assistance which could warrant a finding that they were state actors. Of course, we cannot fairly view the unauthorized actions of private students to be state action merely because they attend a state- supported college and receive the benefit of public funds.

2.

We are also unpersuaded by Mentavlos' claim that the State of South Carolina's regulation of The Citadel and, in turn, The Citadel's rules and regulations made applicable to its students, should compel the conclusion that Anderson and Saleeby were acting "under color of" state law when they engaged in the challenged actions. Specifically, Mentavlos claims that upperclass cadets at The Citadel, by virtue of the Cadet Regulations (*i.e.*, the Blue Book) and the customs at the school, were given broad power or authority to punish freshmen "fourth class" cadets and to engage in hazing such as that allegedly suffered by Mentavlos.

Although Mentavlos correctly asserts that "the extent and nature of governmental regulation over the institution" is a factor to be considered in the state action inquiry, *see* *Goldstein*, 218 F.3d at 343, the mere fact that a private individual or "business is subject to state regulation does not by itself convert its action into that of the State," *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777 (quoting *Jackson*, 419 U.S. at 350, 95 S.Ct. 449). And, "state regulation unrelated to the alleged constitutional violation, even if extensive, is not sufficient, in itself," to transform private action into state action. *Goldstein*, 218 F.3d at 347.

In this case, contrary to Mentavlos' characterization, the Blue Book does not grant to upperclass cadets broad power or authority to discipline freshmen cadets, nor cloak upperclass cadets with the authority of the State for all purposes. Rather, the authority of upperclass cadets at The Citadel is quite limited. Freshmen cadets are directed to obey orders from upperclass cadets. But, within the confines of the same system creating the authority of upperclass cadets to correct freshmen cadets for minor violations and to report others, The Citadel expressly requires the cadets to deal with the incoming freshmen women in a professional manner and expressly prohibits hazing, abusive treatment, or discrimination of any student, male or female. Cadets are required to obtain express permission from a fellow cadet before engaging in even the slightest touching of the cadet, and upperclass cadets are not authorized to impose disciplinary action, except for the most minor rule infractions.

In addition to the limited nature of this grant of authority, The Citadel provides its students with a variety of methods to report violations of the fourth class system, requires the immediate reporting of alleged abuses by all students, and renders expedient punishment for violations of the fourth class system, including violations of the prohibition against abusive or discriminatory treatment. Indeed, the abuses Mentavlos reported were punished when brought to the attention of The Citadel administration and were not taken lightly.

Consequently, upperclass Citadel cadets have some limited measure of authority over freshmen cadets like Mentavlos by virtue of the unique fourth class system created and sanctioned by The Citadel and The Citadel

administration has tolerated the not uncommon military-type practice of upperclassmen mildly harassing freshmen either verbally or by requiring them to engage in undesirable, but physically harmless, tasks such as cleaning or polishing. However, the school clearly "did not endorse or encourage abuses of the fourth class system and, in fact, endeavored to discourage abuses of the type alleged by" Mentavlos. *Mentavlos*, 85 F.Supp.2d at 619. Additionally, Mentavlos presented no contrary evidence that any member of The Citadel administration, faculty, or staff ever encouraged, endorsed, participated in, refused to prevent, or acquiesced in the challenged actions.

In *Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474, 479 (4th Cir.1989), we declined to hold that abusive foster parents were "state actors" for purposes of § 1983, despite the fact that the foster parents were licensed by the state and were entrusted by the state with the care of the abused child. The state "was not responsible for the specific conduct of which the plaintiff complain[ed], that is, the physical child abuse itself ... [,] exercised no coercive power over the [foster parents]," and did not "encourage them" in any way. *Id.*; *see also* *Leeds v. Meltz*, 85 F.3d 51, 54 (2d Cir.1996) (holding that extensive regulation and public funding, while factors to be considered, cannot "transform a private actor into a state actor; instead, the state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor").

Similarly, the findings of the district court in this case, which are not clearly erroneous, demonstrate that the challenged actions of Anderson and Saleeby could not

be fairly characterized as taken in furtherance of the limited authority granted to upper class cadets to instruct and correct fourth class cadets under the Blue Book, nor taken by virtue of a Citadel "custom" to engage in the types of abusive, harassing acts of which Mentavlos' complains.

3.

Mentavlos advances two additional arguments as to why we should consider the challenged actions of Anderson and Saleeby to be state action, neither of which we find to be persuasive.

First, Mentavlos asserts that it is of no consequence that Anderson and Saleeby acted in obvious contravention of the Blue Book's express prohibitions because state officials acting in their official capacities are generally held to act "under color of" state law, even if they act in abuse of their lawful authority. *See* United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Ex parte Virginia*, 100 U.S. 339, 346-47, 25 L.Ed. 676 (1900). Such a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," Mentavlos asserts, must be considered to be action taken "under color of" state law. *Classic*, 313 U.S. at 326, 61 S.Ct. 1031 (finding that state election officials acted "under color of" state law when they failed to count votes as cast, altered ballots, and falsified certification of the votes); *see also* Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (finding that a sheriff and his deputy acted "under color of" state law when they killed a prisoner in their care without justification). Because the Blue Book also required

freshmen to obey the orders of upperclass cadets, the argument goes, the upperclass cadets were effectively placed in a position analogous to state law enforcement officials, rendering their wrongful actions state action for purposes of § 1983.

In support of this proffered analogy, Mentavlos relies particularly upon our decision in *Scott v. Vandiver*, 476 F.2d 238 (4th Cir.1973), in which we held that two county employees deputized by a local sheriff could be "state actors" for purposes of § 1983 where they misused the law enforcement power granted by state law by utilizing excessive force in trying to arrest an innocent person. Pursuant to a longstanding agreement with the county supervisor, county employees could be requested to assist the sheriff on manhunts and the two men involved had served in this role in the past. As such, we held that the county employees were also temporary law enforcement officers when they arrested the plaintiff, "bring[ing] them squarely within § 1983." *Id.* at 241.

In contrast to the county employees in *Scott*, who had been designated law enforcement officials at the time they engaged in the challenged actions, we declined to hold county employees liable under § 1983 for an assault upon a fellow employee in *Hughes v. Halifax County School Board*, 855 F.2d 183 (4th Cir.1988), even though the assault occurred during working hours, on county property, for motives related to their employment with the county. We rejected the claim that the co-employees "were clothed with state authority in so acting," *id.* at 186, noting that unlike in the case of police officers or judges who abuse their state authority while clothed with state power, "[t]he indicia of state authority just isn't the same," *id.* at 187.

In this case, we are not confronted with the question of whether state officials or employees have acted in abuse of lawful authority granted to them by the State. The Citadel may operate under a stricter form of student self- government, and one unique to military-style colleges, but the concept of student self-governance at public and private institutions of higher education, including the use of honor codes and the limiteddelegation of disciplinary authority to certain members of the student body, is hardly a novel concept. A public school or college student is not fairly transformed into a state official or state actor merely because the school has delegated to that student or otherwise allowed the student some limited authority to act. *Cf.* *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir.1997) (en banc) (holding that student editor's decision not to publish an ad in the school yearbook was not state action); *Indorato v. Patton*, 994 F.Supp. 300 (E.D.Pa.1998) (holding that state university football player who struck a referee during a sanctioned football game was not a state actor).

Instead, we are called upon to decide whether the State has encouraged or coerced private individuals to take action which is violative of the constitutional rights of another. At best, Anderson and Saleeby, by virtue of their status as college juniors at The Citadel, were asked and expected to assist in the instruction and correction of freshmen cadets in the applicable rules of The Citadel, but were expressly prohibited from engaging in any actions which could be considered hazing or otherwise abusive of the freshmen students. Mentavlos, having been provided with a copy of the regulations governing their conduct, was made aware of the limitations on the authority given to upper-class

cadets and knew that most or all of the alleged instances of harassment were beyond the authority given and, indeed, in violation of The Citadel's hazing policy. We do not view this limited grant of authority to upperclass students to be analogous to the situation of police officers given broad authority to detain and arrest. Unlike in the case of police officers, or other state officials using their positions to accomplish an unlawful purpose, the cadets were not cloaked with such broad power, nor were they acting pursuant to the limited authority vested in them by the Blue Book. They were students at a state-supported college, acting in a manner proscribed by The Citadel and known by Mentavlos to be violative of the applicable rules. Under these circumstances, their actions cannot in law or fairness be attributed to the State of South Carolina, which is the pertinent inquiry demanded by the facts before us today. *See* *Brentwood*, 531 U.S. 288, 121 S.Ct. at 930; *American Mfrs.*, 526 U.S. at 50, 119 S.Ct. 977; *cf.* *Lugar*, 457 U.S. at 940, 102 S.Ct. 2744 (holding that plaintiff did not state a cause of action under § 1983 because the allegation that a private party's conduct was "unlawful under state law" was tantamount to saying that the conduct "could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the state" (internal quotation marks omitted)).

Mentavlos also offers the Court's recent decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), as support for her claim that the actions of the cadets should be attributed to The Citadel and the state. In *Santa Fe*, the Supreme Court confronted the question of whether student-led, student-initiated invocations

offered prior to football games should be considered private speech endorsing religion protected by the Free Speech and Free Exercise Clause or government speech endorsing religion which the Establishment Clause would forbid. Although the school district's policy purported to allow the students to offer either a religious or non-religious invocation or message, the Court concluded that the religious messages could not be considered private speech because the messages were authorized by government policy, took place on government property at government-sponsored school-related events and, of particular significance, were explicitly and implicitly endorsed and encouraged by the school district. *See id.* at 2275-77, 120 S.Ct. 2266. To the extent *Santa Fe* has application to the claim before us, it is readily distinguishable because The Citadel did not authorize its students to engage in the challenged harassing actions, and did not endorse or encourage them to do so. The Citadel, on the contrary, expressly prohibited acts of this nature.

Because the cadets' decision to engage in unauthorized harassment of Mentavlos was not coerced, compelled, or encouraged by any law, regulation or custom of the State of South Carolina or The Citadel, we hold that the actions of the student cadets cannot "in all fairness" be considered attributable to the State for purposes of § 1983. Accordingly, the requisite "close nexus" between The Citadel's creation and sanctioning of the fourth class system and the specific actions which Mentavlos alleges violated her constitutional right to equal protection under the Fourteenth Amendment is lacking.

V.

For the foregoing reasons, we agree with the district court's determination that the alleged conduct of Citadel cadets Anderson and Saleeby is not "fairly attributable" to The Citadel or the State of South Carolina such that it would be proper to conclude that they were state actors when they allegedly deprived Mentavlos of her constitutional right to equal protection under the Constitution. Because Anderson and Saleeby did not act "under color of" state law when they engaged in the challenged actions, we affirm the district court's grant of summary judgment to them. [FN8]

FN8. Because we conclude that Anderson and Saleeby did not act under color of state law, we need not reach the issue of whether their actions, if taken under color of state law, would have deprived Mentavlos of a right secured by federal law. Consequently, we also need not consider Mentavlos' appeal of the district court's grant of summary judgment to Saleeby on the additional ground that Mentavlos failed to present evidence that he acted with improper gender animus.

AFFIRMED.

END OF DOCUMENT

APPENDIX B

United States District Court,
D. South Carolina,
Columbia Division.

Jeanie MENTAVLOS, Plaintiff,
v.
John Justice ANDERSON; and James Saleeby,
Defendants.

No. CA 3:97-2718-17.

Feb. 15, 2000.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

JOSEPH F. ANDERSON, Jr., District Judge.

This matter is before the court on motion of defendants John Justice Anderson and James Saleeby for summary judgment and, with consent of all parties, for determination by the court of any factual issues relating to whether these defendants are state actors. The state actor inquiry is critical to any determination of liability under plaintiff's sole remaining claim, which is asserted under 42 U.S.C. § 1983, as to the moving defendants.

Plaintiff alleges that defendants Saleeby and Anderson violated plaintiff's constitutional rights to equal protection under the Fourteenth Amendment by taking actions against plaintiff with the intent and to the effect of depriving her of equal access to educational opportunities at a state college. To support this claim, plaintiff must demonstrate, *inter alia,* that these defendants were "state

actors" for purposes of imposing liability under 42 U.S.C. § 1983. This critical threshold issue presents a novel question.

The facts relevant to the state actor issue are largely undisputed. However, to the extent factual issues are presented, the parties have consented to resolution of the factual questions by this court. *Milburn by Milburn v. Anne Arundel County DSS*, 871 F.2d 474, 476 (4th Cir.), *cert. denied*, 493 U.S. 850, 110 S.Ct. 148, 107 L.Ed.2d 106 (1989) (state actor determination "depends on the facts of the case, as it must in each instance"). This order also confirms earlier oral rulings on these defendants' motions for summary judgment and provides further rulings on matters held under advisement.

BACKGROUND

This action is pursued by Jeanie Mentavlos, who was one of the first female students at The Citadel, a state supported institution of higher education in South Carolina. [FN1] Plaintiff initially alleged that a number of cadets and one army officer assigned to the school conspired to harass plaintiff and drive her from the school because of her gender. Plaintiff asserted claims against the individual defendants under both 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

> FN1. Plaintiff entered The Citadel in the fall of 1996 along with three other female students. A female student had entered the prior fall, but remained at the school only a brief time.

The original complaint also alleged that The Citadel was liable for the collective acts of harassment by faculty and

students under Title IX of the Education Amendments of 1972, 20 U.S.C § 1681, *et seq.* In her Title IX claim, plaintiff asserted that the institution had actual knowledge of severe and pervasive gender-based harassment, but failed to adequately respond. Plaintiff alleged that the harassment she suffered was of a kind and degree more severe than inflicted on similarly situated male cadets and that this increased harassment ultimately forced her to withdraw from the school.

The case proceeded through extensive discovery. All defendants except for one defendant who is in default, Edward Bohm, moved for summary judgment as to all claims. These motions were fully briefed and argued. The court requested and received supplemental briefing to help clarify which allegations related to which parties. The court then heard supplemental arguments and made oral rulings as to a number of claims. The remaining allegations were taken under advisement.

In the course of hearing argument on the motions for summary judgment, the court allowed plaintiff to amend her complaint to allege that the individual cadet defendants were themselves state actors for purposes of imposing Section 1983 liability. Prior to that amendment, plaintiff's state actor allegations depended on proof that the cadet defendants acted in concert with one or more members of the college's faculty or staff, including a member of the armed services temporarily assigned to the college.

All claims except those asserted against defendants John Justice Anderson, James Saleeby, and Edward Bohm were resolved by settlement prior to any final ruling on the summary judgment motions. [FN2] The claims against defendant Bohm are not at issue here as he is in

default.

> FN2. At the time of settlement, this court had orally granted various defendants' motions for summary judgment as to certain claims, denied the motions as to certain claims, and still held a number of issues under advisement. The settlement, necessarily, mooted this court's prior rulings as to any settling defendants and the remainder of the motions held under advisement.

The remaining claims against the remaining defendants were set for trial and a jury was selected. On plaintiff's motion and over defendants' objections, the court subsequently dismissed the jury so that the newly-raised state actor theory could first be addressed. The decision to release the jury rested, in part, on all parties' consent to this court's resolution of any underlying factual questions on the state actor issue.

During, or shortly prior to, the hearing on the state actor issue, plaintiff withdrew her allegations under Section 1985, her allegations of violation of due process under Section 1983, and her claims of a Section 1983 conspiracy. Therefore, the only claims remaining against defendants Anderson and Saleeby are based on Section 1983 and allege violation of plaintiff's Fourteenth Amendment right to equal protection of the laws.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir.1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. The nonmoving party, here the plaintiff, must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985). Therefore, "[m]ere unsupported speculation ... is not enough to defeat a summary judgment motion." *Ennis v. National Ass'n of Business & Educational Radio, Inc.*, 53 F.3d 55, 62 (4th Cir.1995).

FACTS REGARDING LIABILITY

While defendants concede that some of the interactions

between the parties occurred, there are significant differences as to the details of the events. However, because this matter is before the court on these defendants' motion for summary judgment, the court must view the record in the light most favorable to the plaintiff. [FN3]

> FN3. Unlike that portion of this order that (by consent) resolves disputed facts as to the state actor issue, the recitation of facts in this section regarding potentially liability-producing events is taken in the light most favorable to the plaintiff. Some of these events are hotly disputed by the defendants.

Plaintiff has produced evidence which, if believed, would show that Cadet Saleeby was involved in three instances of harassment or improper treatment of plaintiff:

1. The Fire Incident--Saleeby, together with Bohm, came into plaintiff's room in October 1996 and lit plaintiff's clothing on fire. The fire was first lit by Bohm. Plaintiff promptly put out the fire using her hands. After Saleeby commented that plaintiff did not have permission to move, Saleeby then directed Bohm to again set fire to plaintiff's clothes. Bohm did so. This time, plaintiff did not move. As the flames grew, defendant Saleeby used his foot to put out the fire. Plaintiff described the action of putting out the fire as kicking or brushing her with his foot. The kicks were apparently to plaintiff's waist area. [FN4] The force was adequate to knock plaintiff back, but not to knock her down or leave bruises. The fire did not cause any burns to plaintiff, but did burn a hole about the size of a tennis ball in her sweatshirt.

FN4. The fire was set to the pouch pocket on the front of plaintiff's sweatshirt. This pocket is located at or near the waist. Plaintiff has testified that this "kicking action" was used to put out the fire, although plaintiff felt Saleeby used more force than necessary for this purpose. Prior to plaintiff's disallowed affidavit that was submitted after jury selection (*infra* n. 7), there was no suggestion that the kick was to any area other than the stomach, hip or waist, as testified by another female cadet present during the incident. Plaintiff's own testimony regarding a kick to the waist area may, however, relate to another incident.

2. The Kicking Incidents--On one or more later occasions, defendant Saleeby kicked plaintiff in the legs. At least once, he did so after saying that plaintiff "likes to be kicked." None of these incidents left bruises on the plaintiff.

3. The Shorts Incident--On one occasion fairly early in the school year, cadet Saleeby entered plaintiff's room wearing only non-uniform shorts and shower-type shoes. He did not have on a shirt. Plaintiff believed at the time that the shorts were boxer shorts (underwear) and she felt uncomfortable, although she did not believe that anything about the visit was sexual in nature. Defendant Saleeby subsequently produced an affidavit and photograph demonstrating that the shorts were gym shorts, rather than boxer shorts (underwear). Plaintiff has offered no contrary evidence of the actual nature of the shorts, as opposed to her perception at the time. [FN5]

FN5. In her deposition in this action, plaintiff was asked whether Saleeby had on underwear beneath the shorts at issue. Plaintiff replied: "I don't know whether he did or not. I just saw *what appeared to be boxer shorts or shorts with no shirt and no shoes.*" Pltf depos (December 1998) at 174 (emphasis added).

At a hearing set for oral ruling on the motion for summary judgment, plaintiff withdrew any claims that Saleeby should be held liable for events involving a second fire or making plaintiff sit on an upturned trash can (the so-called "naughty knob bucket" routine) [FN6] for an extended period of time. Both of these events involved cadet Bohm. There was no evidence offered to connect Saleeby to these events. There are no other viable claims against defendant Saleeby. [FN7]

FN6. Freshman at The Citadel are referred to as "knobs."

FN7. After the oral ruling on summary judgment, and on the eve of a final pretrial hearing relating to the state actor issue, plaintiff submitted an affidavit that included some additional allegations relating to cadet Saleeby that were not previously presented to the court. For reasons set forth in its order on Motion to Strike Affidavit (entered December 14, 1999), this court rejected any new allegations contained in this affidavit, except as they related to the state actor issue.

Plaintiff has produced evidence which, if believed, would show that Cadet Anderson was involved in three different instances of harassment or improper treatment of plaintiff:

1. The Cardboard Incident--Early in the school year, when correcting plaintiff for smiling when she was at attention, Anderson took plaintiff into another room and shut the door with only the two of them present. Anderson began ranting and raving at plaintiff, pushing cardboard into her face and chin. The incident left welts under plaintiff's chin that lasted for one or two days. During the incident, Anderson made crudely worded comments to the effect that he had been sloppy when he first came to The Citadel, but the experience whipped him into shape quickly and could do the same for plaintiff. [FN8] He also stated that even though his parents had taught him "not to hit girls," he would make an exception for plaintiff.

> FN8. Plaintiff characterized the comments very differently in her most recent affidavit, which this court rejected as discussed in its order on Motion to Strike Affidavit. *Supra* note 7.

2. The Thanksgiving Drinking Incident--Cadet Anderson was involved in an incident in which plaintiff was disciplined by upperclassmen for coming in drunk just before the Thanksgiving break. Anderson's involvement was limited to stopping plaintiff and a female classmate and sending them to the company commander's room. Plaintiff alleges that this limited involvement is actionable because Anderson treated the two female cadets differently than two male classmates based on gender differences rather than on differences in behavior. Plaintiff's testimony has varied as to the

details of this incident, and it is not clear from the record whether plaintiff was with the male cadets when she was stopped or whether the circumstances differed between them such that, even if the four freshmen were together, Anderson had no reason to stop the males.
3. The Threats of Physical Violence--Anderson made threatening statements to plaintiff at various times, including statements that he would physically harm or kill plaintiff or her brother, who was an upperclass cadet at The Citadel.

In addition to the above allegations, plaintiff had alleged that Anderson went into plaintiff's room with other upperclassmen when plaintiff was not present, opened her underwear drawer, and made comments regarding the relative breast sizes of plaintiff and her roommate. Plaintiff offered only hearsay testimony that the event occurred. This court, therefore, orally granted summary judgment on this allegation for lack of any admissible evidence.

In each of the preceding incidents, plaintiff alleged that defendants used their authority as upperclassmen to some degree. That is, they relied on the basic power of an upperclassman to direct the activities of freshmen and to require the freshmen to stand at attention. However, the events alleged all violate official written school policy. The relevant rules and policies are discussed in detail below.

As plaintiff acknowledged in her various depositions, she was aware that the upperclassmen were engaging in prohibited activities in each instance. [FN9] Plaintiff reported some of these incidents at the time they occurred (the Anderson cardboard and Saleeby "boxer shorts" incidents). In most cases, however, she did not

report the incidents until just before she withdrew from the school in December 1996. Plaintiff asserts that she did not report most incidents of alleged harassment for fear that defendants and other upperclassmen would retaliate by increasing their harassment of plaintiff. There is evidence in the record from which a jury could conclude that this concern was reasonable. Plaintiff also believed that the punishment previously dispensed for the incidents she reported had been inadequate.

> FN9. In one of her depositions, plaintiff conceded she knew she did not have to obey illegal orders and that she could have walked out when faced with a threatening incident. Pltf depos, (December 1998) at 194- 95. She also knew the fire incident was more serious than the cardboard incident. *Id.* at 196. Nonetheless, she felt that reporting the fire incident would not have insured that such an event would never happen again because she was fearful of retaliation and because she felt Anderson had received too light a punishment for the cardboard incident.
> Plaintiff's recent affidavit relating to the state actor issue also supports this conclusion, as plaintiff concedes that she was aware that any order to open her lock box was in violation of school rules. As noted above, the court has not allowed plaintiff to amend her allegations or factual record at this time to raise these new allegations, but will consider the affidavit only as it relates to the state actor issue. *Supra* note 7.

The school disciplined Anderson for the cardboard incident by restricting him to campus for some period of

time and by requiring him to "walk tours." [FN10] Cadets, including Saleeby, were reminded of the proper rules of attire after plaintiff reported that Saleeby had come into her room clad only in shorts.

> FN10. "Walking tours" is a form of punishment that involves marching in a set pattern for a specified period of time.

Plaintiff's later reports of harassment or hazing by Saleeby and Anderson and other students resulted in significant investigations and punishments by the school. A number of cadets, including these defendants, were effectively placed on house arrest during the investigations. Defendant Saleeby faced a commandant's board and was suspended from the school for one year. Defendant Anderson resigned from The Citadel rather than face a commandant's board. His resignation precludes his return to the school.

Gender Motive Evidence

During the first oral argument on the summary judgment motions of numerous parties, it became clear to this court that the various allegations against the numerous defendants were not adequately delineated. The court, therefore, asked plaintiff to submit an outline which, *inter alia,* individually described each of her allegations of harassment at The Citadel and explained what evidence connected each defendant to any given allegation. The court also requested a specification of all evidence showing gender-based motivation on a defendant-by-defendant basis.

Plaintiff subsequently filed a detailed chart summarizing

this information and attaching all supporting evidence. In these submissions, plaintiff primarily relied on a single short and general statement from her own deposition to support her suggestion that she was harassed *because of her gender*. Specifically, in a deposition in a related matter, *Mellette v. Jones*, C/A 2:93- 488-2 (D.S.C.), plaintiff testified that a number of cadets told her she "didn't belong" at The Citadel. Pltf Chart, Exhibit 10C (Pltf depos (*Mellette*) at 179). The cadets listed included "Batson, Amhaus, Spruills, Anderson, [and] Bohm." *Id.* While it may be debatable whether such a generic statement is adequate evidence of gender bias, this court has presumed, for present purposes, that it is.

There is at least some suggestion of other animus evidence as to Anderson. According to an FBI report of a statement given by Anderson, he "was concerned at the beginning of the school year when he found out that female cadets would be allowed to attend The Citadel. Anderson was concerned that the females would disrupt the atmosphere of The Citadel. Anderson made it a point to have very little contact with the female cadets because he felt they were nothing but trouble." [FN11]

> FN11. The FBI agent's summary of Anderson's statements obviously presents hearsay concerns. Nonetheless, for purposes of the present motion, the court has presumed this evidence might be admissible against the moving party. No objections to the form of the submission have been raised.

Plaintiff's generic statement that numerous cadets told her that she did not belong at The Citadel does not include

any reference to Saleeby. By contrast, there is uncontradicted evidence that Saleeby, at various times, took action beneficial to plaintiff. In early September, when plaintiff first experienced the pain in her pelvic area, she "approached ... Saleeby because the pain was just unbearable." Saleeby asked if plaintiff could run down the stairs (as required of freshmen) to get back to her room. When plaintiff said she could not, Saleeby walked her down to her room "so nobody would give [her] a hard time." As plaintiff recalls, Saleeby also got her some ice that night. Pltf depos (*Mellette*) at 48-49. Saleeby also gave plaintiff permission to go to the infirmary. Plaintiff concedes that Saleeby did not give her "a hard time" about the situation. Pltf depos (*Mellette*) at 50.

While Saleeby did not expressly encourage plaintiff to remain at The Citadel, he did tell her that if she stayed through Christmas, he would give her a memento (apparently an item of cadet insignia) that was passed down through the years between cadets who were from Charlotte. Pltf depos (*Mellette*) at 141. Plaintiff, like Saleeby, was from the Charlotte area, and it was now his turn to pass on the memento. Pltf depos (*Mellette*) at 141. Plaintiff testified that her relationship with Saleeby never soured, although she lost respect for him due to his actions, such as coming into her room in what she believed were boxer shorts and his presence during other incidents she felt were improper. Pltf depos (*Mellette*) at 142. Plaintiff also testified that Saleeby checked on a fellow female freshman, Kim Messer, several times when she left the mess hall ill. Pltf depos, (*Mellette*) at 247. Someone, possibly Saleeby, followed up to insure plaintiff was okay on a similar occasion. Pltf depos (*Mellette*) at 247.

In her deposition in this action, plaintiff conceded that, with the exception of the fire incident, Saleeby's actions towards her were just playful harassment. Pltf depos (December 1998) at 168. From the beginning, she felt "that [Saleeby] was a professional cadet." *Id.* Thefire incident "was out of character for him." *Id.*

Various statements in the FBI's summary of Saleeby's FBI interview also suggest he held a generally positive view of the female cadets. Specifically, Saleeby stated that before cadre, he and another cadet discussed the fact that having the women in their unit would be a good learning experience. In the beginning, Saleeby felt plaintiff was one of the best knobs he had ever seen. By the end of her stay, however, he felt she was only average. After observing four female cadets during cadre, he concluded that the other three would "make it," but plaintiff might not because she seemed to be there only because her father made her attend The Citadel. [FN12]

> FN12. As noted above regarding the Anderson FBI interview summary, the court would normally have concerns regarding the hearsay status of this document. Here, however, the document was offered by plaintiff in opposition to defendants' motion for summary judgment. Neither side objected to the form of the evidence.

FACTS REGARDING STATE ACTOR STATUS

The Citadel and Fourth Class System

Critical to resolving the present motion is an understanding of the nature of The Citadel experience. The official policy of the school is contained in a number

of written manuals, including the "Blue Book," which is provided to all students. The version provided to plaintiff and in effect during her freshman year was the 1996 Blue Book (hereafter "Blue Book").

While Citadel staff and administration retain ultimate authority for the operation of this military style system, day-to-day functioning is dependent on the cadet chain of command. Indeed, many of the benefits of the military training model derive from this delegation of authority. The greater responsibilities under the system go to the more senior students, who are supervised and mentored by staff or active duty military personnel assigned to the school. These more senior students, in turn, mentor and supervise those students below them.

The school operates on a military model, with an adversative training system. Blue Book, Chap. 2 (Command, Control and Organization). All students wear uniforms and are subject to extensive military style rules and living conditions. Freshmen, in particular, are subjected to a fairly extreme set of disciplinary and behavioral rules under what is referred to as the "Fourth Class System."

> A. GENERAL. The Fourth Class System at The Citadel is singularly unique in its evolution, traditions, implementations, and purpose. The Fourth Class System is the cornerstone of the military lifestyle which surrounds each Citadel Cadet. Its evolution has been natural within an institution whose mission of The Corps of Cadets has changed little since its inception: "To educate male undergraduates as members of The South Carolina Corps of Cadets and to prepare them for post-graduate positions of leadership through academic programs of recognized excellence supported by the best features of a disciplined military environment."

Blue Book, Chap. 16. Clearly, with the admission of women to The Citadel, this mission was modified to include female undergraduates. There is no evidence that the mission has otherwise been modified.

"The Fourth Class System at The Citadel requires strict and unquestioning obedience, mental and physical toughness, and mature tolerance of confrontation and is an intense, high-stress experience designed to facilitate development of 'The Whole Man.' " Blue Book Chap. 16.B. The "Whole Man" concept is "designed to produce excellence in four areas: academics, military, physical fitness and moral, ethical, and spiritual growth." Blue Book, Chap. 16.C. While the program is restrictive, the written policy requires implementation in a manner that "support[s] each cadet's requirement to achieve academic excellence" and prohibits use of the system to "interfere with a cadet's right to adequate sleep and food." Blue Book, Chap. 16.D.2-3.

Freshmen must come to attention whenever an upperclassman enters their barracks or speaks to them. Blue Book, Chap. 16.I.2.f. & 3.d. Freshmen are allowed only very limited, formal responses to upperclassmen: "yes Sir;" "no Sir;" "no excuse, Sir;" and "request permission to make a statement, Sir." Blue Book, Chap. 16.G.1. When outside their own room or classroom, they are generally required to move briskly (walk at 120 steps per minute) or to stand at attention. Blue Book, Chap. 16.I.2. f, g & I.; Chap. 16.I.3.b & d. Freshmen are prohibited from using a number of common areas. Blue Book, Chap. 16.I.5.a-f. The freshmen are required to spend time in drill and in performing company details such as cleaning the common areas of the barracks. Blue Book, Chap. 16.J.1-7. They are required to follow detailed and restrictive procedures at meals and to

memorize and recite certain factual information at meals and other times. Blue Book, Chap. 16.I.4. a-n & L.1-3.

In addition to the official rules, which make life as a Citadel freshman unusually restrictive for a college student, it is apparently not at all uncommon for upperclassmen to mildly harass freshmen either verbally or by requiring the freshmen to engage in an activity not of the freshman's choosing (*e.g.*, spending long periods of time polishing a given item). Nonetheless, the school expressly prohibits any action that might be deemed hazing or abusive treatment of freshmen:

> H. Violations of the Fourth Class System
>
> 1. Hazing. Hazing is a violation of the South Carolina State Law and Citadel Regulations and is punishable by expulsion from The Citadel. Hazing is defined as striking, offering bodily harm, treating with violence, verbal abuse or any treatment of a tyrannical, abusive, or humiliating nature by a member of a higher class to a member of a lower class. Hazing includes requiring performance of personal service or humiliating verbal abuse.
>
> 2. Other major violations of the Fourth Class System on the part of upperclassmen, which may not constitute hazing, are considered serious offenses and are punished in accordance with Annex B.
>
> 3. All violations of the Fourth Class System are reported immediately. Hazing and major violations of the Fourth Class System are reported to the Commandant within one hour of its discovery, regardless of the time of day.

Blue Book, Chap. 16-H.1-3. *See also* Blue Book, Chap. 16.J.7. (also prohibiting requiring freshmen to perform tasks of a personal nature for upperclassmen); Chap. 16.G.3. (prohibiting touching without permission and allowing touching only to provide correction and only in

an open area in full view of at least one other cadet); & 16.G.4. (allowing freshmen to "focus exclusively on academics" while attending class and during published study periods).

The Blue Book provides as follows regarding contact with freshmen:

K. Contact with Fourth Classmen.

* * * * * *

2. Training, counseling, and inspecting fourth classmen is restricted to the chain of command. Correcting and reporting fourth classmen is the responsibility of all cadets and officers associated with The Citadel who may observe an infraction of the part of a fourth classman.

Blue Book, Chap. 16.K.2.

Ultimate responsibility for enforcement of the fourth class system rests on the Commandant, although day-to-day functioning is overseen by the Cadet Regimental Commander, a cadet senior. Blue Book, Chap. 16.F.1-2. Active duty military officers assigned to the school are also "responsible for teaching, advising, and mentoring cadet leaders as they implement the Fourth Class System." Blue Book, Chap. 16.F.3. An army officer was assigned to plaintiff's company in such a supervisory role. "All personnel have an obligation to report any Fourth Class System violations to an appropriate authority." Blue Book, Chap. 16.F.4. Freshmen also have formal rights to appeal their treatment as freshmen. Blue Book, Chap. 16.M.

The school expressly prohibits discrimination on the basis of gender and various other impermissible criteria. Blue Book, Chap. 1.H.1-6. The Blue Book provides

extensive guidance as to what is considered sexual harassment and provides a variety of means for handling complaints. Blue Book, Chap. 1.H.1- 7. Training was given to the higher ranking cadet officers prior to the arrival of the female students to insure the anti-discrimination policy was disseminated.

Formal discipline as to any infraction of any school rule is accomplished through a system of reporting violations using "performance reports." Blue Book, Chap. 6.G. Performance reports may be "submitted by an officer of The Citadel Faculty or Staff, cadet rank holders, members of the Cadet Guard, and by any cadet on himself, when directed by proper authority." Blue Book, Chap. 6.G.1. However, the Commandant retains primary responsibility for administering the disciplinary system. Blue Book, Chap. 6.A.2.

Performance reports for improper conduct are forwarded to the Commandant's office for recording, then to the offending cadet who may either acknowledge the offense or submit a written explanation and forward the document to the company commander. Blue Book, Chap. 6.G.2.c. The company commander may note the punishment for a class III offense (class III offenses all have assigned punishments, Chap. 6.E.1.c.) or recommend punishment for certain other offenses. Blue Book, Chap. 6.G.2.d. The ultimate punishment decision is, however, made by the Commandant or Assistant Commandant except as to the most minor rule infractions. *See* Blue Book, Chap. 6.G.2.e.

Findings of Fact as to State Actor Status

Defendants Saleeby and Anderson were both upperclassmen in Echo Company to which plaintiff was

assigned. Both were juniors and held the rank of sergeant in the fall of 1996. At no time was defendant Anderson in plaintiff's direct chain of command. Defendant Saleeby was in plaintiff's chain of command during the first portion of her training known as "cadre." During this period, he served as plaintiff's squad leader. Although Saleeby later moved from plaintiff's direct chain of command, plaintiff still perceived him as someone with particular authority over her due to his earlier position of direct authority. Some of the events alleged as to Saleeby may have occurred during the cadre period. [FN13]

> FN13. Plaintiff alleges that the Saleeby-Bohm fire incident occurred in early or mid-October. The cadre period ran through October 12, 1996.

Plaintiff was required by official school policy to come to attention when Saleeby, Anderson or any other upperclassmen entered her room or spoke to her. She was allowed to answer them only with the limited responses allowed freshmen in addressing upperclassmen. *See supra,* Fourth Class System.

Plaintiff was aware that certain forms of harassment were prohibited by official school policy. She was aware that each of the actions now alleged falls within the prohibited actions. She was aware of her options to report improper actions and to refuse to obey an unlawful order.

Nonetheless, there were potential negative consequences to either behavior, of which plaintiff was also aware. Refusal to obey an order could only be undertaken at the risk of disciplinary action in the event the ultimate

authority concluded the order was not improper. Given the uniqueness of the system, the average freshman could be expected to have some difficulty discerning the lawfulness of many orders. Most or all of the alleged instances of harassment still at issue in this action, however, were known to plaintiff to be unlawful. [FN14]

> FN14. Plaintiff's early reports of the cardboard incident and the "boxer" short incident demonstrate this knowledge. She was also clearly aware that touching or threatening harm was unlawful. In short, only the allegations of different disciplinary treatment by Anderson in regard to the Thanksgiving drinking incident might raise issues relating to plaintiff's knowledge of the propriety of any action by an upperclassman still at issue in this action. Even that is doubtful given the school's clear rules regarding gender discrimination. At most, plaintiff was uncertain whether the school would believe her version of events: that she was treated differently than male cadets under similar circumstances.

Certainly reporting harassment or refusal to obey questionable, if not clearly invalid, orders risked an increase in pressure and punishment by upperclassmen in general and the offending upperclassman in particular. In a Fourth Class System such as The Citadel's, which emphasizes class unity, peer pressure is particularly significant and might also be negatively affected by failure to "go along."

The court, therefore, finds that the moving defendants had at least some measure of authority over plaintiff by

virtue of the system created and sanctioned by The Citadel, a state institution. Their authority, however, was limited to that of any given upperclassman in her company, except as to Saleeby during the cadre period. The specific allegations at issue, however, are not of a type as to which Saleeby's particular authority as squad leader would be relevant.

While limits were imposed by the system and plaintiff had options in responding to improper behavior, the system itself enhanced the likelihood plaintiff would be discouraged from reporting violations and would suffer some negative result from exercising her options to report harassment. Nonetheless, it is quite clear that the school did not endorse or encourage abuses of the fourth class system and, in fact, endeavored to discourage abuses of the type alleged by plaintiff.

The very abuses plaintiff alleges as to the present defendants were punished or adequately addressed when brought to the school's attention. Plaintiff reported the Anderson cardboard incident when it occurred. Anderson was punished. When plaintiff raised concerns that males (including Saleeby) were wearing boxer shorts in view of the female cadets, the cadets were reminded of the need to dress appropriately. [FN15] While more severe sanctions could have been imposed in either case, the school had many factors to consider, including the risk of hindering the assimilation of women if the school overreacted. This court concludes, therefore, that the discipline imposed and responses given were within a reasonable range of discretion to preclude any inference that the school endorsed or condoned the alleged behaviors.

> FN15. As noted above, it is now evident that Saleeby did not wear the boxer shorts when entering plaintiff's room. He did, however, appear without a shirt which also violated school rules. While a violation of rules, it was a relatively minor infraction, and the court cannot say that more than a reminder was called for. Plaintiff concedes no further incidents relating to improper apparel occurred involving Saleeby.

The plaintiff's December 1996 reports as to other allegations of abuse also led The Citadel to impose serious, if not severe, sanctions. While the school's response to plaintiff's December reports necessarily did not occur until after plaintiff left the school, it evidences the fact that the school did not condone the behaviors at issue. Perhaps most telling is the fact that several cadets involved in the alleged instances of harassment (including Anderson) resigned, rather than face a commandant's board. This strongly suggests that these cadets were well aware that the incidents of alleged hazing would not be treated lightly.

The court, therefore, finds as to the state actor issue that the alleged actions of defendants Saleeby and Anderson fall clearly within the categories of harassment that are expressly prohibited by the official written policy of the school. The court further finds that the school's actual enforcement of its official policies relating to the Fourth Class System was adequate to preclude any finding that the school endorsed or encouraged any contrary informal policy. The court does not suggest any conclusion as to whether the school's enforcement of its official policies were adequate for any other purposes. [FN16]

FN16. This court is not making a finding as to whether the school's efforts to prevent abuse were ideal or even adequate for any purposes beyond the state actor determination. The court does not find it necessary to resolve the broader questions for purposes of the present order. To resolve them, the court would need to consider numerous issues of fact including whether the school actively discouraged students from seeking redress beyond the school's own system (such as by reporting abuse to outside sources), if the student subjectively questioned the school's enforcement efforts or otherwise determined that allegations of abuse should be made public.

Finally, the court finds that while the Fourth Class System established by the school has known risks of abuse, as well as disincentives to reporting any abuse, these risks are inherent in the unique educational opportunity offered at The Citadel. To require that the risks be eliminated would be to eliminate the very system of education on which the school is based. This is not to say that the risks can be ignored. However, if the school makes genuine and reasonable efforts to minimize the risks, it cannot be said to endorse the abuses that might result.

The court finds that the school was well aware of the risks and the history of abuse of the Fourth Class System. The court finds, however, that the school had made efforts to manage the risks by placing final disciplinary control with the Commandant and staff, by creating a variety of methods to report violations, by imposing numerous requirements for immediate reporting of alleged abuse,

and by imposing adequate punishments for reported abuses when established. The numerous provisions of the Blue Book cited above, various reports commissioned by the school, and positions taken publicly by the administration support these conclusions. *See, e.g.*, Defendant's Exhibit 4 "Commandant's Notes" (article by Colonel Trez discussing concerns with Fourth Class System, various prior studies, and ongoing efforts to retain the benefits of the fourth class system while ending any abuses).

DISCUSSION

Plaintiff's remaining Section 1983 claim alleges that defendants Saleeby and Anderson violated plaintiff's rights under the Fourteenth Amendment. The Fourteenth Amendment, like most constitutional amendments, only limits actions by governmental entities. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Therefore, plaintiff must not only prove that the actions were undertaken under color of state law, but also that defendants' actions constituted action by the state. *Id.* at 935 n. 18, 102 S.Ct. 2744 (discussing the relationship between the color of law and state actor requirements). The analysis of the state actor issue begins with the presumption that college students are generally not state actors. Plaintiff argues, however, that the cadets became state actors by virtue of the special role played by upperclass cadets at The Citadel.

The Supreme Court set out a three step analysis for determining state actor status in *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In *Blum*, the Court declined to find that a private nursing home was a state actor as to its decisions to discharge or transfer Medicaid patients, despite the fact that the home

received significant state funding and was subject to extensive regulation. The *Blum* standard was recently summarized by the Fourth Circuit Court of Appeals as follows:

> The Supreme Court has identified three situations in which particular conduct by a private entity constitutes "state action." *The first situation is the symbiotic relationship and occurs when there is "a sufficiently close nexus between the state and the challenged action of the regulated entity such that those actions may be fairly treated as those of the state.* The inquiry is whether the state is responsible for the specific conduct of which the plaintiff complains." ... The second situation involves extensive governmental regulation of a private entity: "a state may be held responsible for private conduct only when it has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state." ... *The final situation occurs when "the private entity exercised powers that are traditionally the exclusive prerogative of the state."* Relevant to all three situations is the level of governmental funding the private entity receives, although "[r]eceipt of state funds [alone] is ... insufficient to transform ... private actions into state action." ... The Supreme Court, when addressing the extent to which state regulation will convert private actions into state actions has held on numerous occasions that the regulatory scheme must impact directly the alleged constitutional violation.

Haavistola v. Community Fire Co. of Rising Sun, Inc. 6 F.3d 211, 215 (4th Cir.1993) (emphasis added). The Fourth Circuit also noted that "the Supreme Court has limited the symbiotic relationship analysis ... '[to] lessees of public property.' " *Id.* at 215. *See also Beverley v. Douglas*, 591 F.Supp. 1321, 1329 (S.D.N.Y.1984) (neither state regulation nor funding are alone enough to

support a finding of state action) (quoted in *Haavistola*, 6 F.3d at 214-15). In the case of a regulated entity, "the inquiry must be whether there is a sufficiently close nexus between the State and *the challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (emphasis added) (simply because utility was heavily regulated and held a partial, governmentally protected monopoly was not sufficient to support finding of state action).

Plaintiff relies on two of the tests discussed in *Blum* and *Haavistola:* the close nexus test and the exclusive state function test. These tests are discussed separately below.

1. Exclusive State Function Test

Plaintiff argues that The Citadel is engaged in an exclusive state function because it is in the business of providing military training akin to that provided by the service academies: West Point, the Naval Academy, and the Air Force Academy. Specifically, plaintiff relies on the fact that the doctrine first announced in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) has been applied to the students at these service academies. *See Collins v. United States*, 642 F.2d 217, 220-21 (7th Cir.) (*Feres* doctrine applies to cadets at United States military academies), *cert. denied*, 452 U.S. 964, 101 S.Ct. 3115, 69 L.Ed.2d 975 (1981). The *Feres* doctrine bars members of the military services from bringing claims against the government under the Federal Tort Claims Act for service related injuries. *Collins*, 642 F.2d at 219.

Plaintiff supports her argument that The Citadel is in the

same business as the military academies in part by reliance on the fact that The Citadel is one of only six colleges in the United States designated as a "Senior Military College." 10 U.S.C. § 2111a(f). This designation provides special accommodations for the appointment of active duty military officers to serve in a variety of positions, including tactical officers or commandant of cadets. 10 U.S.C. § 2111a(a)-(c). The graduates of the Reserve Officer Training Corps ("ROTC") programs at these six colleges are guaranteed active duty assignments if they so desire and are otherwise qualified. 10 U.S.C. § 2111a(e).

One of the six colleges accorded this special designation, Norwich University, is a private university. Another, Virginia Military Institute, offers a program quite similar to The Citadel, as both have only military students in their primary (day) programs. The remaining schools appear to offer both civilian and military education in a combined setting. The United States Supreme Court has stated that the goal of Virginia Military Institute is the production of "citizen soldiers." *See United States v. Virginia*, 518 U.S. 515, 520, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("VMI's distinctive mission is to produce 'citizen-soldiers,' men prepared for leadership in civilian life and in military service.")

Plaintiff's analogy to the service academies is misplaced. Students at the service academies are, in fact, military personnel who incur a service commitment in exchange for their education. *E.g.*, *Collins*, 642 F.2d at 220-21; 10 U.S.C. § 8075(b)(2) (Air Force Academy cadets included as members of the Air Force); 10 U.S.C. § 6959 (addressing service obligation of Naval Academy midshipmen); 10 U.S.C. § 802(2) (academy cadets are subject to discipline under the Uniform Code of Military

Justice). The *Feres* doctrine applies to service academy cadets because they are, *in fact, members* of the relevant military branches. *Collins*, 642 F.2d at 220-21. [FN17]

> FN17. This court is not determining that the application of the *Feres* doctrine is synonymous with a determination of state action or even that it provides any particular guidance on the present issue. Such a determination is unnecessary in light of the conclusion that The Citadel is not the equivalent of a military academy.

While The Citadel bases its educational experience on a military model, the comparison to the academies ends there. The education is no more at government expense than at any other state supported college. Neither do Citadel students incur a service obligation simply because they attend The Citadel. Most significantly, Citadel cadets are not members of the armed forces, unless they are members of the reserve as a consequence of signing a contract in an ROTC program. [FN18] In that regard, Citadel cadets stand in no different position than an ROTC student at any other college, whether state or private. *See Wake v. United States*, 89 F.3d 53, 55-56 (2d Cir.1996) (*Feres* doctrine barred Naval ROTC student from suing the government for injuries sustained while traveling under orders for the purpose of taking her entrance physical because the injury occurred in connection with her service).

> FN18. All cadets at The Citadel are required to attend ROTC classes during all four years at the institution. Nonetheless, they are *not* required to

> sign an ROTC contract. Only those who make such a commitment are considered as enrolled in ROTC from the perspective of the United States government. Ultimately, only about one third of Citadel cadets actually sign an ROTC contract and accept a commission in the military.

Certainly, The Citadel uses a military model that more closely resembles life at a service academy than life at most college campuses--even those offering ROTC programs. The Citadel is not, however, primarily in the business of training military officers. Its mission is the production of "the whole [person]," not the production of citizen-soldiers. Thus, its stated goal is dissimilar to VMI's mission as quoted by the United States Supreme Court above. In any case, no showing has been made that even VMI's mission statement would cause it to be treated as the equivalent of a military academy.

Plaintiff's theory equating The Citadel to a service academy is also troubling in that this court can see no significant distinction between what The Citadel does and what many private secondary schools do: using a military model as a basis for instilling discipline and providing leadership training. Under plaintiff's theory, every high school military academy would be engaged in an "exclusive state function." The long standing prevalence of such private institutions, demonstrates the non-exclusivity of military model training. Indeed, it would appear that most high schools based on a military model are private institutions, although Junior ROTC is offered at a number of public schools as a component of the educational offerings. In short, education and training based on a military model are not historically an exclusive state function. This is further confirmed by the fact that

one of the six "Senior Military Colleges" is a private institution.

Plaintiff's reliance on *Alton v. Texas A & M University*, 168 F.3d 196 (5th Cir.1999) for the proposition that upperclass cadets have been presumed to be state actors in their interactions with lower class cadets is misplaced. It does not appear that these issues were ever raised in *Alton*. Rather, the Fifth Circuit noted only that "the student cadet leaders ... were *arguably* acting under color of state law" while it was undisputed that "the defendant officials are state actors." *Id.* at 199 (emphasis added). In *Alton*, only the claims against the officials were at issue on appeal. The Fifth Circuit expressly declined to decide whether the students were even acting under color of state law, given its disposition of the case on other grounds. *Id.* at 200. As noted in *Lugar v. Edmundson Oil*, a greater showing is required to demonstrate state actor status than to demonstrate action under color of state law. 487 U.S. at 935 n. 18, 108 S.Ct. 2751. Thus, *Alton* offers no guidance on either the state actor or lesser color of state law requirements.

Likewise, *Morse v. Regents of the University of Colorado* does not support plaintiff's suggested conclusion that a senior cadet is a state actor in regard to interactions with subordinate cadets. 154 F.3d 1124 (10th Cir.1998). The *Morse* court merely held that it was "reasonable to infer that because the student was a superior cadet he exercised some measure of authority" over lower ranking cadets. *Id.* at 1128. This finding, made in the context of a Title IX case, is a far cry from a state actor determination for Section 1983 purposes. [FN19]

FN19. The alleged harassment in *Morse* went far

> beyond the cadet as it was "exacerbated and perpetuated by ... an ROTC instructor," a Colonel. The Title IX claim rested on the university's failure to respond appropriately to these allegations and allegations of retaliation for reporting the harassment to university representatives. Thus, whether the offending cadet's actions were actions of the university, the ROTC department, or simply a fellow student, was of little legal consequence.

By contrast, cases actually addressing the state actor issue appear to have consistently held that student actions are not state actions merely because the student serves in some role authorized by the state and exercises the powers inherent in that role. *See* Yeo v. Town of Lexington, 131 F.3d 241, 248-51 (1st Cir.), *cert. denied*, 524 U.S. 904, 118 S.Ct. 2060, 141 L.Ed.2d 138 (1998) (student editors' decision not to accept newspaper and yearbook advertisements was not state action where students were given autonomy to make the decisions at issue, even though they had faculty guidance); Indorato v. Patton, 994 F.Supp. 300 (E.D.Pa.1998) (football player who struck referee during game was not state actor, despite the fact that he received a scholarship, liability insurance, and uniform at the school's expense and was subject to various rules laid down by the school and various sports organizations in connection with his varsity status).

In any case, plaintiff's theory would prove too much. If the cadets were, effectively, military trainees, they would likely be barred from pursuing damages claims against their superiors under the Supreme Court's decision in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76

L.Ed.2d 586 (1983). In *Chappell,* the Court held that enlisted members of the Navy could not sue their military commander for damages for constitutional violations. *Id.* at 305, 103 S.Ct. 2362. The Court wrote: "The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by ... exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 304, 103 S.Ct. 2362; *see also Introini v. South Carolina National Guard,* 828 F.Supp. 391, 393 (D.S.C.1993) (applying *Chappell* to bar claim by National Guard member against superiors for alleged retaliatory discharge and noting that "it appears that every court of appeals that has addressed this issue since *Chappell* ... has held that a member of the National Guard may not sue his military superiors ... under § 1983").

Plaintiff seeks to distinguish *Chappell* and *Introni* by arguing that "[n]either the defendants nor the plaintiff in this case were in the military or serving in the National Guard at the time of the challenged acts." Plaintiff's November 30, 1999 memorandum at 5. This is, of course, a correct factual statement and the very reason this court rejects plaintiff's analogy to the service academies and her reliance on the *Feres* doctrine as applied to academy cadets. This court does not rely on *Chappell* and *Introni* except to demonstrate additional difficulties with the service academy analogy. That is, *if* The Citadel *were* the equivalent of a service academy such that the *Feres* doctrine would apply to the students in their non-ROTC activities, *Chappell* and its progeny would likely bar relief. [FN20]

FN20. The Supreme Court recently held that the

> qualified immunity defense was not available to private parties in two specific circumstances involving Section 1983 claims. *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997) (private prison guards who have been held to be state actors are not entitled to qualified immunity from Section 1983 liability for actions directed towards prisoners); *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (private parties who conspire with state officials are not entitled to qualified immunityfrom Section 1983 liability for invoking state replevin, garnishment or attachment statutes). In both cases, the Court emphasized the need to determine the availability of immunity with specific reference to the historical role of the state in carrying out the function at issue. If qualified immunity does not follow a state actor determination as to a private party, then the "superior officer" immunity also may not follow, although this result is far from certain, given the specificity of the inquiry.

This court concludes that The Citadel is in the business of providing a post- secondary education with a goal of assisting students to achieve a well-rounded development in all spheres of life and with an emphasis on leadership training. That the school seeks to achieve these goals through a military model may make its system of training fairly unique. It does not, however, convert the primary business of The Citadel into that of producing military officers. It is beyond dispute that providing post-secondary education is not traditionally an exclusive state function. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (while

providing *high school* level education is a public function, it is not traditionally the *exclusive* province of the state). Neither is the use of a military model for education historically limited to public schools. This court must, therefore, conclude that the exclusive state function model does not provide a basis for finding defendants to be state actors.

2. Close Nexus Test

As the United States Supreme Court recently emphasized, there are two critical steps to proving state action. *American Manufacturers Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (applying nexus test). First, plaintiff must show that the alleged "constitutional deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* 526 U.S. 40, 119 S.Ct. at 985 (internal quotations omitted). Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* (internal quotations omitted).

The "state actor" inquiry "begins by identifying the specific conduct of which the plaintiff complains." *Id.* (internal quotations omitted). In cases involving extensive state regulation, the court must determine whether "there is a sufficiently close nexus between the State *and the challenged action* of the regulated entity so that the latter may be fairly treated as that of the State itself." *Id.* 526 U.S. 40, 119 S.Ct. at 986 (internal quotations omitted) (emphasis added). Whether an adequately " 'close nexus' exists ... depends on whether the State has exercised *coercive power* or has provided such *significant encouragement,* either overt or covert,

that the choice must in law be deemed to be that of the State." *Id.* 526 U.S. 40, 119 S.Ct. at 986 (emphasis added) (internal quotations omitted). [FN21]

> FN21. There is some authority tosuggest that the close nexus test is limited to lessees of public property. If this is a correct statement of law, this test is clearly inapplicable to the student-school relationship before this court. *See* *Haavistola* 6 F.3d at 214-15 (quoted *supra*). It would also appear arguable that this test's reference to "regulated entities" is not intended to reach individuals who are participants in a state sponsored training program simply because that program "regulates" their activities. Because this court resolves the state actor issue on other grounds, it need not resolve these questions.

In *American Manufacturers,* the Court ultimately concluded that private insurers who withheld payments for disputed medical treatments under the authority of provisions of the state's workers compensation law were not state actors. *American Manufacturers,* 526 U.S. 40, 119 S.Ct. at 986. The Court reasoned as follows: (1) the state law authorized, but did not require withholding; (2) the decision to withhold payment was made by private parties; and (3) the decision turned on judgments made by private parties without standards established by the state. *Id.* 526 U.S. 40, 119 S.Ct. at 986 (citing *Blum*).

The Court expressly rejected any argument that the state had authorized or encouraged denials by granting a new option to insurers in how they handled denials. The Court held that such "subtle encouragement is no more

significant than that which inheres in the State's creation or modification of any legal remedy," which was simply not enough. *Id.* 526 U.S. 40, 119 S.Ct. at 986. Neither did the "State's role in creating, supervising, and setting standards for the [underlying decision] process" justify a finding of state action. *Id.* 526 U.S. 40, 119 S.Ct. at 987.

Applying the guidelines of *American Manufacturers,* this court would not find the cadet defendants to be state actors. Their actions may have been made possible by the system established by the state, but these cadets did not receive significant encouragement and did not exercise the state's coercive powers. This conclusion is supported by the additional cases discussed below.

While there seems to be no case addressing a situation similar to the one before this court, various decisions of the United States Supreme Court, the Fourth Circuit Court of Appeals and other courts of appeals addressing a variety of situations in which private actors are alleged to have become state actors provide some guidance. The United States Supreme Court has refused to treat a private school that specialized in dealing with students who had difficulties in the public schools as a state actor, despite extensive state regulation and funding. *Rendell-Baker v. Kohn,* 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (relying in part on the fact that the function of education was not traditionally the *exclusive* prerogative of the State, although it was a public function). Similarly, in *Milburn by Milburn v. Anne Arundel County DSS,* 871 F.2d 474 (4th Cir.), *cert. denied,* 493 U.S. 850, 110 S.Ct. 148, 107 L.Ed.2d 106 (1989), the Fourth Circuit held that foster parents were not state actors because "neither the contract nor the approval form provides for any kind of intimate relationship between the State and the [foster parents], nor is there any detailed guidance of

the [foster parents] nor any regulation of the conduct complained of." *Id.* at 477.

The Citadel does, through its regulations, exercise significant control of the details of the cadets' lives. Upperclassmen, in turn, exercise significant control over freshman cadets' lives. A foster parent, however, has far more control over the foster child than an upperclassman has over a Citadel freshman. Moreover, while the details of day-to-day life in a foster home may not have been set out, states do provide general guidelines for foster parents, particularly in prohibiting certain activities. *See Milburn*, 871 F.2d at 477 (contract provided "only the most general guidelines for the ... foster home").

Further, unlike a cadet, a foster child is placed in the foster home on the authority of the state and may not leave without the permission of the state. *See Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 795 & 797 (11th Cir.1987) ("child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of Fourteenth Amendment rights"--"in both cases, the person is unable to seek alternative living arrangements"), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989). [FN22] A cadet is free to leave at any time, at least as far as the state is concerned. Thus, while not dispositive, the denial of state actor status to a foster parent suggests that a cadet would not normally be considered a state actor simply because the upperclass cadet may control various aspects of the freshman cadet's life. This would at least be true to the extent the cadet is acting beyond the powers expressly granted to the upperclassman by the state college's administration.

FN22. In *Taylor,* plaintiff challenged the placement decision and the state's failure to supervise the home whereas in *Milburn,* plaintiff challenged the foster parent's actions more directly. Even with this distinction, it appears the two circuits would take a different approach to the questions of state action as *Taylor* focuses on the exercise of the state's coercive power over the *child,* while *Milburn* considered whether the state has exercised coercive power over the *foster parents.* Neither focus would result in a finding of state action in this case, as students are not compelled to attend or remain at The Citadel.

The Supreme Court has, under various circumstances, refused to extend state actor status to private schools, private nursing homes, and regulated utilities, despite receipt of government funds and the private entities' involvement in activities that are highly regulated and frequently, though not exclusively, within the province of state government. *See Blum, supra* (nursing home not state actor as to its decision to discharge or transfer medical patients); *Jackson, supra* (regulated entity not a state actor as to its decision to terminate service to customer); *Rendell-Baker, supra* (private school for maladjusted children not a state actor as to its decision to discharge employees). As discussed above, the Fourth Circuit has declined to find state action in the relationship between foster parent and foster child. The Fourth Circuit has also refused to find state actor status when county employees assaulted a fellow employee, despite the fact that they did so on county land, while on duty, in uniform, and using state supplied rope. *Hughes v. Halifax County School Board,* 855 F.2d 183 (4th Cir.), *cert.*

denied, 488 U.S. 1042, 109 S.Ct. 867, 102 L.Ed.2d 991 (1989).

The preceding cases suggest a narrow application of the nexus test. The cases on which plaintiff relies do not suggest any broader application, as these cases all involved either penal institutions or the delegation of the state's police powers. [FN23] Whether or not these two areas involve exclusive state functions, they clearly involve delegation of the state's coercive powers of arrest and imprisonment. [FN24] While a cadet may have some authority over other cadets, the power is simply not comparable to that exercised by a police official or prison warden. Even the school's own exercise of power is not so broad. [FN25]

FN23. In her memorandum filed November 5, 1999, plaintiff cites to numerous cases in which private persons or organizations were held to be state actors. Four of these cases involved actions occurring in or relating to penal institutions. The remaining eight involved the exercise of police powers where the actors had the authority to make arrests. Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment at 2, & 6-7 (filed November 5, 1999).

FN24. Some grounds for debate on the exclusivity may have been raised by *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), in which the Supreme Court noted in a different context that the *operation* of prisons has not historically been an exclusive state function. *Cf. Conner v. Donnelly*, 42 F.3d 220, 224 (4th

Cir.1994) (relying on an earlier Supreme Court opinion as having "made clear ... that the provision of medical services to prison inmates is traditionally the exclusive prerogative of the state"). Many other cases cited by plaintiff involving prison related claims against private parties appear to rest on the same presumption.

FN25. The decision of some cadets to leave the school rather than face a commandant's board illustrates this point. The students were at all times free to leave the school. While the school might require that they remain under "house arrest" or face a commandant's board if they chose to remain at the school, it could not require them to make the choice to stay.

It is beyond dispute that the two remaining defendants in this action exercised some level of general authority over plaintiff and that this authority existed by virtue of their status as upperclassmen under a *system* established and perpetuated by the state. Both also held some official duty relating to freshmen, with cadet Saleeby having some direct authority over plaintiff as her squad leader during cadre. Cadet Anderson may have held a similar position as to some freshmen, but plaintiff was not among these freshmen.

The state did establish the very system that, due to propensities of human nature, may lead to excesses in the use (and abuse) of power and which may discourage reporting of abuses. This alone, however, is not enough to find that the cadet defendants' actions were the actions of the state. Otherwise, every system established by the

state which has some predictable abuses by private persons could potentially convert private actions into actions of the state. The Supreme Court and the Fourth Circuit cases cited above demonstrate that this is not the law. *E.g.*, *American Manufacturers Mut. Ins. Co., supra* (workers compensation carriers); *Milburn, supra* (foster care).

It simply does not appear that the nexus here is sufficiently close as measured between the state and the *challenged action.* Each of the actions on which plaintiff's claims rest are expressly prohibited, not condoned, by the state. This is demonstrated both by official written policy, by the school's various attempts over recent years to eliminate abuse of the system, and by the school's response when plaintiff's allegations were brought to light.

This court is not determining that no action by an upperclass cadet could ever be state action. Circumstances could arise in which specific authority is delegated to a cadet, and that cadet exercises that specific delegated authority in compliance with school (state) policy, and in a way which supports a finding of state action. This court has simply concluded that this case does not present circumstances adequate for a finding that these defendants' actions can be deemed the actions of the state.

For the reasons stated above, this court concludes that defendants Saleeby and Anderson were not state actors as to the allegations giving rise to the claims remaining in this action. As this is a necessary element of plaintiff's remaining theory of liability, these defendants are entitled to judgment as a matter of law.

OTHER SUMMARY JUDGMENT ISSUES

In prior hearings, plaintiff withdrew some allegations as to the moving defendants and the court granted summary judgment as to all other claims against defendants Saleeby or Anderson except those set forth in the Facts section of this order. *Supra* at 612-14. As noted above, evidence has now been submitted that demonstrates that defendant Saleeby did not enter plaintiff's room in boxer shorts, although this may well have been plaintiff's perception. Defendant Saleeby is therefore entitled to summary judgment as to this allegation on this factual basis, as well as on the grounds discussed above.

To support her remaining Section 1983 allegations, plaintiff must not only prove defendants' state actor status and a constitutional injury (here deprivation of equal access to educational opportunities as guaranteed by the Fourteenth Amendment), but must also prove that any injury was caused by improper actions directed towards her *because of her gender*. The record reveals no evidence that defendant Saleeby's actions towards plaintiff were motivated by gender bias. The only evidence of record relative to Saleeby suggests the opposite motivation. Defendant Saleeby is, therefore, entitled to summary judgment as a matter of law on this additional ground. [FN26]

> FN26. This is by no means an endorsement of the behaviors alleged: setting fire to clothing or kicking. No matter how intended, these behaviors present a serious risk of harm. They cross the clear line that must be drawn to prevent abuse of an adversative training system. These actions could also give rise to a state law action for

> assault, which is not here asserted. Nonetheless, absent evidence of discriminatory motive, plaintiff's allegations against Saleeby cannot support plaintiff's Section 1983 claim.

While the evidence of gender motive as to defendant Anderson is weak, his collective actions and comments could give rise to an inference that he mistreated plaintiff because of her gender and with an intent to drive her from the school. But for the ruling as to the state actor status, jury issues would be presented as to at least two of plaintiff's three remaining allegations relating to defendant Anderson.

As noted above, plaintiff's version of the events relating to the Thanksgiving drinking incident is unclear as to whether she was with the male students when stopped by Anderson and whether the relative behavior of the males and females justified differential treatment. As plaintiff bears the burden of proof, this presents a close question as to summary judgment. Given the resolution of plaintiff's claims on other grounds, the court will not resolve this question.

CONCLUSION

For the reasons stated above, this court concludes that defendants Anderson and Saleeby were not state actors as to the allegations against them. Both are, therefore, entitled to summary judgment as to the plaintiff's sole remaining cause of action under Section 1983. Defendant Saleeby is entitled to summary judgment on all claims for the additional reason that plaintiff has failed to present evidence that he acted with improper gender animus. He is also entitled to judgment on the

allegations relating to improper apparel for lack of evidentiary foundation.

Plaintiff's claims against defendants Saleeby and Anderson are, therefore, dismissed with prejudice. All of her other claims, except as to defendant Bohm, have been resolved by settlement. The present action is, therefore, ended, except as to the damages hearing on the claims against Mr. Bohm, who is in default.

IT IS SO ORDERED.

(2)

No. 01-224

Supreme Court, U.S.
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In The

Supreme Court of the United States

JEANIE MENTAVLOS,

Petitioner,

v.

JOHN JUSTICE ANDERSON; JAMES SALEEBY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Sandra J. Senn
Counsel of Record
Stephanie P. McDonald
SANDRA J. SENN, P.A.
3 Wesley Drive
Charleston, South Carolina 29407
(843) 556-4045

Counsel for Respondents

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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QUESTIONS PRESENTED

I. Whether upperclass students given limited authority to correct minor rules infractions but who instead violate written school policy expressly prohibiting abusive treatment or discrimination may fairly be deemed state actors at a college whose mission is to educate civilian students and produce community leaders?

II. Whether the Fourth Circuit properly applied the state action test by exhaustively analyzing the numerous facts and tests applicable in the state-action context, recognizing that these criteria lack rigid simplicity, and considering that state action has been found when a private entity is entwined with governmental policies?

III. Whether the actions of students at a state-supported college, acting in a manner proscribed by the college and known by the plaintiff to be violative of the applicable rules, can in law or fairness be attributed to the State of South Carolina?

IV. Whether the Fourth Circuit properly held that upperclass students at The Citadel were not state actors as they are no more members of the military than students attending other state-supported colleges in South Carolina and as the functions of military protection and training have not been delegated to them by the state or federal governments?

V. Whether the District Court properly granted summary judgment to Respondent Saleeby because Petitioner failed to produce any evidence of gender-based discrimination on his part?

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STATEMENT OF THE CASE

Petitioner, a former student at The Citadel, brought this action after leaving the school in 1996. All claims except those against student defendants John Justus Anderson, James Saleeby, and Edward Bohm were settled prior to the district court's final ruling on the pending summary judgment motions.

Initially, plaintiff's allegations depended upon proof that the student defendants acted in concert with one or more members of the college's faculty or staff. When it became apparent, however, that plaintiff could in no way establish the proof necessary to support this theory, the court allowed her to amend her complaint to allege that the individual cadet defendants were themselves state actors. *See Mentavlos v. Anderson*, 85 F. Supp. 2d 609, 611 (D.S.C. 2000). Plaintiff then withdrew her allegations under Section 1985, her allegations of due process violations under Section 1983, and her claims of a Section 1983 conspiracy. The only claims remaining against defendants Anderson and Saleeby allege violations of plaintiff's Fourteenth Amendment right to equal protection.

The parties consented to the District Court's resolution of any underlying factual questions relevant to the state actor inquiry, and a bench trial was held on November 17, 1999. On February 15, 2000, the District Court ordered that summary judgment be granted in favor of defendants Anderson and Saleeby, holding that they were not state actors. The District Court further concluded that the record revealed "no evidence that defendant Saleeby's actions towards the plaintiff were motivated by gender bias." *Id.* at 628.

On interlocutory appeal, the Fourth Circuit considered the actions of the student defendants under both prior state action analyses as well the flexible entwinement framework set forth recently in *Brentwood Academy v.*

Tennessee Secondary School, 212 S.Ct. 924 (2001). The Fourth Circuit affirmed the District Court's granting of summary judgment, holding that these "were students at a state-supported college, acting in a manner proscribed by The Citadel and known by Mentavlos to be violative of the applicable rules. Under these circumstances, their actions cannot in law or fairness be attributed to the State of South Carolina, which is the pertinent inquiry determined by the facts before us today." *Mentavlos v. Anderson*, 249 F.3d 301, 322 (4th Cir. 2001). Respondents are now before this Court opposing the Petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

In the fall of 1996, Jeanie Marie Mentavlos decided to enter The Citadel as one of its first four female freshmen. Petitioner Mentavlos has alleged that she was mistreated by other student members of the Corps of Cadets. She claims that because of her gender, and as part of The Citadel's long fight to keep women out of the Corps, certain individual student cadets acted in concert with The Citadel and its leaders to sexually harass her and drive her from the school.[1] At the close of discovery, the plaintiff had produced no evidence to support her constitutional claims.[2]

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1 Petitioner has admitted that she has no evidence to suggest that either Saleeby or Anderson was involved in this alleged conspiracy.

2 The Petition for a Writ of Certiorari again re-hashes a host of issues not in any way associated with the current appellees (*i.e.*, Shannon Faulkner ordeal and internet photo) or the state action analysis.

Respondents were low level sergeants, and many cadets outranked them. They could not give official punishment to the plaintiff, as said action would have had to go through the chain of command and actually be approved by a member of The Citadel faculty. *Mentavlos*, 85 F. Supp.2d at 618-619. At most, what the defendants could do is simply write "white slips" or "performance reports" for the plaintiff so that she would have to face charges of violations[3].

In her Petition, Mentavlos appears to once again assert new allegations against these Respondents. Switching gears from her prior claims in an attempt to create sexual discrimination where none exists, she presents the contradictory statement that Saleeby set a fire "at her waist, close to her breasts, presumably so that her undergarments would show through." (Petition at p. 26). Never once has she presented this "presumption" in the past. Heretofore, she claimed that other defendants set her t-shirt on fire near her breast area, but Saleeby was not one of these defendants. If the Court reviews the photographs of that t-shirt, it is difficult to imagine how Ms. Mentavlos' breasts or undergarments could have possibly been located in the areas where the shirt was burned. However, the t-shirt is a non-issue. Defendant Saleeby has only been accused of setting Mentavlos' sweatshirt (not t-shirt) on fire, on the tag area. This tag was located near her waist, and near the pockets of the sweatshirt, as photographed. 85 F. Supp.2d at 612, 612 n.4. (Please see also photograph attached at App. 1).

The Fourth Circuit's proper affirmance on the state actor issue is of considerable importance as it will have a lasting and tremendous impact on the viability of The

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[3] Interestingly, defendant Saleeby only wrote the plaintiff a performance slip for merits and good conduct, not demerits.

Citadel's fourth class system as it currently exists.[4] This issue was properly decided as a matter of law because different juries could make varying determinations as to whether a mere cadet, who is not even of significant rank, can be a "state actor" for Section 1983 purposes. This issue is important not only to the military school itself, but to any parent who sends his or her child to military school. Heretofore, it was simply not foreseeable that sending a child to military college could subject that child to liability for having become an "arm of the state."

Throughout this litigation, plaintiff has made numerous, contradictory allegations, even as her theories of liability continued to metamorphose. Yet two things are certain. One, the plaintiff knew she did not have to obey illegal orders such as allowing herself to be set on fire. *Id.* at 614; *see also* 249 F.3d at 322. Two, she was free to leave the school at anytime and was certainly no prisoner there.

Petitioner now claims that the two remaining defendants, Jamie Saleeby and Justus Anderson, were most responsible for her plight. However, the record clearly shows that Cadet Anderson had little contact with Mentavlos. And Saleeby was, in fact, one of her few comforters as other cadets chided her for being a poor cadet. *See e.g.*, 85 F. Supp.2d at 615. Ironically, though Mentavlos now claims that Saleeby and Anderson were her worst foes, they just so happen to be the only two defendants who decided to challenge Ms. Mentavlos to prove her claims. She simply failed to prove those claims to the District Court, and the Fourth Circuit properly affirmed.

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[4] The Citadel could never afford to insure all cadets as potential state actors, and it is highly unlikely that any military school could afford said insurance.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit properly applied the state action test by exhaustively analyzing the numerous facts and tests applicable in the state-action context, recognizing that these criteria lack rigid simplicity, and considering that state action has been found when a private entity is entwined with governmental policies.

Relying upon this Court's recent opinion in *Brentwood Academy v. Tennessee Secondary School*, 212 S.Ct. 924 (2001), Petitioner claims that the district court applied too rigid a test for state action. An analysis of *Brentwood*, however, demonstrates that the entity considered there is in no way analogous to the student cadets in this case. In *Brentwood*, the Court examined the Tennessee Secondary School Athletic Association, "a not-for-profit membership corporation organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it. No school is forced to join, but without any other authority actually regulating interscholastic athletics, it enjoys the memberships of almost all the State's public high schools (some 290 of them or 84% of the Association's voting membership), far outnumbering the 55 private schools that belong." *Id.* at 928.

When certain penalties challenged by Brentwood, a private school, were imposed, "all the voting members of the board of control and legislative council were public school administrators." *Id.* at 929. The entwinement down from the State Board was "unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it." *Id.* at 933.

The Court did not abandon all prior state action tests in *Brentwood*, but presented the limited holding that when "the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test." *Id.* at 934.

Here, even a flexible analysis of the facts and relevant state action cases establishes that these student cadets were not state actors for Section 1983 purposes. As the opinion of the district court details, Petitioner produced evidence which, if believed, would show that the defendants were each involved in three incidents of harassment or improper treatment. As to Saleeby, these were the October 1996 lighting of plaintiff's clothing on fire and his kicking or brushing with his foot to extinguish the fire, the allegation that on one or more later occasions Saleeby kicked the plaintiff in the legs, and that on one occasion, Saleeby entered plaintiff's room wearing only non-uniform shorts and shower-type shoes. *Mentavlos*, 85 F. Supp.2d at 621-613.

As to Anderson, plaintiff asserted that while making crudely worded comments, Anderson pushed cardboard into her face and chin, leaving welts that lasted one or two days, that he stopped the plaintiff and another female cadet after they came in drunk just before Thanksgiving break and sent them to the company commander's room, and that he made threatening statements to the plaintiff at various times, including statements that he would physically harm or kill plaintiff or her brother, who was an upperclass cadet. The events alleged as to both defendants "all violate official written school policy." *Mentavlos*, 85 F. Supp.2d at 613-14.

Throughout this litigation and over the course of several theories of liability, plaintiff has been unable to establish any government participation in these private activities. In *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 658 (4th Cir. 1998), the Fourth Circuit reiterated that:

> [a]cting under color of state law is equivalent to that of state action under the Fourteenth Amendment. The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" "This fundamental limitation on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'"

Id. at 658 (internal citations omitted).

"The essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury. If there is no state action, then the court may not impose constitutional obligations on (and thus restrict the freedom of) private actors." *Yeo v. Town of Lexington*, 131 F.3d 241, 248-49 (1st Cir. 1997), *cert. denied* (June 1, 1998). As in *Yeo*, a case dealing with two student editors' decision not to publish an ad in a school yearbook, the actions of which plaintiff complains as to both Anderson and Saleeby were actions taken by students. The First Circuit explained in *Yeo* that the only decisions that it found "which assume there is state action do so where the parties agreed there was state action and it was undeniable the decision makers were government officials." *Id.* at 251. This is not such a case. Here, the students "are themselves at least facially private actors." *Id.* at 251.

Similarly, in *Indorato v. Patton*, 994 F. Supp. 300 (E.D. Pa. 1998), a district court held that a state university football player who struck a referee during a sanctioned football game was not a state actor for Section 1983 purposes. The court reached this result even though the athlete received a scholarship, liability insurance and a uniform free-of-charge from the school. *Id.* at 307. Rejecting plaintiff's arguments under the "symbiotic relationship," "joint participant," "nexus" and "government function" tests, the court noted that plaintiff had failed to establish that playing football at a state university was anything more than a student activity. Mentavlos has likewise failed to demonstrate that any of the acts taken against her by individual cadets were anything more than student activities, particularly in light of The Citadel administration's orders that the cadets' duty required that they deal with the freshman women in a professional manner. The Citadel's "Blue Book" clearly prohibits hazing and in fact, a cadet must obtain permission from a fellow cadet before engaging in even the slightest touching of him or her. 85 F. Supp.2d at 617.

Significantly, the *Indorato* court held that:

> Plaintiff's comparison of football players with state troopers is irrelevant. The fact that both football players and state troopers may, inter alia, wear uniforms, "function in a quasi-military structure," have "specific job assignments," and follow rules, . . . is not dispositive on the issue of whether Defendant is a state actor. As the court explains throughout this opinion, what matters is the nature and extent of Defendant's contacts with the state.

Id. at 305 n.10. The same must be said of the students in this case.

"The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described "in all fairness" as a state actor." *Dowe* at 659. *Brentwood* did not eliminate this central inquiry. In *Hughes v. Halifax County School Board*, 855 F.2d 183 (4th Cir. 1988), a former school employee sued school officials and fellow employees under Section 1983, alleging that "he was assaulted, battered, and subjected to intentional emotional distress under color of state law because he was accosted by county employees with retaliation in their eyes, on county land, with county-owned rope, during work hours." *Id.* at 186. Rejecting the indicia of authority relied upon by Hughes, the Fourth Circuit stated that if the actions of his fellow employees amounted to state action, then "any employee of the state who commits a tort has potentially violated 1983. We cannot endorse such a result." *Id.* at 187. The same result would follow here if this Court were to permit a holding that these individual student cadets were state actors with respect to their involvement with this plaintiff. To do so would dictate that any Citadel cadet who commits a tort against an underclassman has potentially violated 1983. Such a result would be untenable and inconsistent with the purpose of this statute.

II. The actions of students at a state-supported college, acting in a manner proscribed by the college and known by the plaintiff to be violative of the applicable rules, cannot in law or fairness be attributed to the State of South Carolina.

Plaintiff initially attempted to characterize the actions of cadet defendants Anderson and Saleeby as "state action" by asserting that they "acted as aider, abettor or co-conspirator in concert with the state actions" of

The Citadel defendants. She abandoned this claim, however, when an examination of her evidence, revealed that she could not support such a theory, especially as to Anderson and Saleeby. To date, plaintiff has produced no evidence that any member of The Citadel administration was ever involved in any hazing, harassment, or otherwise improper acts. She has also been unable to establish that any member of The Citadel administration, faculty, or staff acquiesced in the acts of the individual students or that "administrators and faculty encouraged, sanctioned and refused to prevent hazing, harassment and abuse of the new female students, including plaintiff." *See Mentavlos*, 85 F. Supp.2d at 619 ("Nonetheless, it is quite clear that the school did not endorse or encourage abuses of the fourth class system and, in fact, endeavored to discourage abuses of the type alleged by plaintiff"). Thus, it is difficult to comprehend how the individual, unauthorized actions of either student Anderson or Saleeby could be categorized "in all fairness" as attributable to the State. Indeed, plaintiff's abandonment of the constitutional conspiracy causes of action is telling in that it epitomizes the lack of proof that she has been able to set forth to connect the private acts of the student cadets to any state actor.

The District Court and Fourth Circuit considered and noted numerous policies demonstrating that the actions of which plaintiff has complained were forbidden and that the school was taking steps to eliminate such instances. For example:

1. Hazing. Hazing is a violation of the South Carolina State Law and Citadel Regulations and is punishable by expulsion from The Citadel. Hazing is defined as striking, offering bodily harm, treating with violence, verbal abuse or any treatment of a tyrannical, abusive, or humiliating nature by a member of a higher class to a member of a lower class. Hazing includes requiring performance of personal service or humiliating verbal abuse.

2. Other major violations of the Fourth Class System on the part of upperclassmen, which may not constitute hazing, are considered serious offenses and are punished in accordance with Annex B.

3. All violations of the Fourth Class System are reported immediately. Hazing and major violations of the Fourth Class System are reported to the Commandant within one hour of its discovery, regardless of the time of day.

Blue Book, (Supp. App. at pp. 364-423) Chap. 16-H.1-3. See also Blue Book, Chap. 16.J.7. (also prohibiting requiring freshmen to perform tasks of a personal nature for upperclassmen); Chap. 16.G.3. (prohibiting touching without permission and allowing touching only to provide correction and only in an open area in full view of at least one other cadet); & 16.G.4. (allowing freshmen to "focus exclusively on academics" while attending class and during published study periods).

The Blue Book provides as follows regarding contact with freshmen:

> K. Contact with Fourth Classmen.
>
> * * * * * *
>
> 2. Training, counseling, and inspecting fourth classmen is restricted to the chain of command. Correcting and reporting fourth classmen is the responsibility of all cadets and officers associated with The Citadel who may observe an infraction of the part of a fourth classman.

Blue Book, Chap. 16.K.2.

> * * * * * *
>
> "All personnel have an obligation to report any Fourth Class System violations to an appropriate authority." Blue Book, Chap. 16.F.4. Freshmen also have formal rights to appeal their treatment as freshmen. Blue Book, Chap. 16.M.
>
> The school expressly prohibits discrimination on the basis of gender and various other impermissible criteria. Blue Book, Chap. 1.H.1-6. The Blue Book provides extensive guidance as to what is considered sexual harassment and provides a variety of means for handling complaints. Blue Book, Chap. 1.H.1- 7. Training was given to the higher ranking cadet officers prior to the arrival of the female students to insure the anti-discrimination policy was disseminated.

Mentavlos, 85 F. Supp.2d at 617-618; *see also* 249 F.3d at 308-310.

The record simply does not support plaintiff's argument that any harassment or hazing by other student cadets that took place at The Citadel was controlled or directed by school officials. Indeed, the uncontradicted testimony has demonstrated that any isolated acts by individual cadets were in no way coerced or even encouraged by the administration. To the contrary, such conduct was discouraged and cadets found to have participated in such activities were disciplined, and even expelled, a punishment viewed as overly harsh by many observers.

In fact, "the very abuses plaintiff alleges as to the present defendants were punished or adequately addressed when brought to the school's attention. Plaintiff reported the Anderson cardboard incident when it occurred. Anderson was punished. When plaintiff raised concerns that males (including Saleeby) were wearing boxer shorts in view of the female cadets, the cadets were reminded of the need to dress appropriately." *Mentavlos*, 85 F. Supp. 2d at 619.[5]

The plaintiff's reports as to other allegations of abuse also led The Citadel to impose serious, if not severe, sanctions. "A number of cadets, including these defendants, were effectively placed on house arrest during the investigations." "While the school's response to plaintiff's December reports necessarily did not occur until after plaintiff left the school, it evidences the fact that the school did not condone the behaviors at issue. Perhaps most telling is the fact that several cadets involved in the alleged instances of harassment (including Anderson) resigned, rather than face a commandant's

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[5] Plaintiff was mistaken as to Saleeby wearing boxer shorts, as those shorts were obtained for the FBI and by the court. They are thick, gym like shorts with a company logo and no "flap" or opening as found on boxer shorts. 85 F. Supp.2d at 619 n.15

board. This strongly suggests that these cadets were well aware that the incidents of alleged hazing would not be treated lightly." *Id.* at 619-620.[6]

Private conduct constitutes state action only if it is compelled, or significantly encouraged, by the state, not when it is merely authorized, or acquiesced in, by the state. *See e.g., Leeds v. Meltz*, 85 F.3d 51, 54 (2nd Cir. 1996)("extensive regulation and public funding, either alone or taken together, will not transform a private actor into a state actor; instead, the state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor"). Here, there was neither authorization nor acquiescence.

III. The Fourth Circuit properly held that upperclass students at The Citadel were not state actors as they are no more members of the military than students attending other state-supported colleges in South Carolina and as the functions of military protection and training have not been delegated to them by the state or federal governments.

Petitioner's argument relies heavily upon her assertion that "it goes without saying that training civilians for a military career is a traditional governmental function, since preparing and controlling the military is a central and exclusive governmental role." The record makes clear, however, that

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[6] Saleeby faced a commandant's board and was suspended from the school for one year. Anderson's resignation precludes his return to the school. 249 F.3d at 309-310.

> [w]hile The Citadel bases its educational experience on a military model, the comparison to the [service] academies ends there. The education is no more at government expense than at any other state supported college. Neither do Citadel students incur a service obligation simply because they attend The Citadel. Most significantly, Citadel cadets are not members of the armed forces, unless they are members of the reserve as a consequence of signing a contract in a ROTC program. In that regard, Citadel cadets stand in no different position than an ROTC student at any other college, whether public or private.

Mentavlos, 85 F. Supp.2d at 622.

Colonel Joseph Trez, Commandant of Cadets, testified that the primary mission of The Citadel is to educate students. It does so within a military framework to prepare its students for postgraduate work as leaders and managers of our country. Trez recalled that in 1996, two of the 1800 students were commissioned officers, and only because they had attended an early commissioning program elsewhere. And even those commissions were not federally recognized until the end of their college years. None of the cadets involved here–Mentavlos, Anderson, or Saleeby–held ROTC contracts. It was stipulated that only about one-third of the Corps of Cadets enters the military upon graduation. 249 F.3d at 314-316. Further, even if the school itself were performing an exclusive public function, it does not automatically follow that the students themselves would be state actors.

With respect to other factors of the state action analysis, it is clear that:

> it is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory of subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action. A private school's discharge of employees was not state action in spite of the fact that the school was extensively regulated and highly subsidized by the state. The state's regulatory and funding activities had not compelled the discharge of those employees, *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); *see also Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), just as they had not compelled a private nursing home's involuntary transfer and discharge of a group of Medicaid patients.

Arlosoroff v. National Collegiate Athletic Ass., 746 F.2d 1019, 1022 (4th Cir. 1984). The fact that state assistance has been given to The Citadel and that its professors and administrators are state employees is likewise not enough. Nor are the statutes creating and regulating The Citadel unique under South Carolina law. The University of South Carolina receives aid from the State, and similar statutes regulate the powers and composition of its board of trustees, its fund-raising activities, and its acquisition of facilities. *See e.g.* S.C. Code Ann. §59-117-10, *et seq.* It simply does not follow, however, that such regulation and funding would render the *students* at such institutions state actors.

In support of her argument that the state itself would consider the students state actors, plaintiff relies upon that the categorization of The Citadel as a "Senior Military College" by 10 U.S.C. § 2111a, amended in 1997 in response to action taken by the Secretary of Defense. The findings of fact upon which plaintiff relies note "the long-standing relationship of the Armed Forces with the senior military colleges" and the interests of the United States Department of Defense. Plaintiff also cites a line of authority relating to Section 1983 actions and National Guard officers and seemingly analogizes the state and federal interrelationship of that entity to the "special military" status of The Citadel.

Plaintiff continues to cite *Alton v. Texas A&M University*, 168 F.3d 196 (5th Cir. 1999), as one of the judicial opinions which "have assumed that upper-class cadets imposing discipline on lower class cadets are "state actors." A reading of both the Fifth's Circuit's opinion and the district court's opinion in *Alton v. Hopgood*, 994 F. Supp. 827 (S.D. Tex.), however, demonstrates that the state action argument was never pursued by the student defendants in the Texas A&M case. The Texas district court's opinion did not even consider this step in the Section 1983 analysis and the Fifth Circuit's language seems to ask why such the state action argument was not asserted.

Of greater significance is the fact that plaintiff devotes much of her argument in this section to how Congress views the unique positions of the six military colleges and then misses the key step in the argument by failing to analyze how the state views the students themselves. In fact, plaintiff's only mention of the state's viewpoint during this discussion is to set forth the following statutory language:

> All members of the board of visitors, administrative staff and faculty personnel of The Citadel, the Military College of South Carolina, shall be eligible to be commissioned officers in the unorganized militia of South Carolina and the Governor shall issue commissions to such of them as are designated by the college according to the rank prescribed by that institution.

S.C. Code Ann. § 25-1-520. But the question here is not whether the college, board of visitors, administrative staff or faculty personnel are state actors, but whether student cadets, under the facts of this case, are. And they are noticeably absent from this statute, which is the only such evidence which plaintiff presents in her brief to support the "state consideration" factor.

> Certainly, The Citadel uses a military model that more closely resembles life at a service academy than life at most college campuses--even those offering ROTC programs. The Citadel is not, however, primarily in the business of training military officers. Its mission is the production of "the whole [person]," not the production of citizen-soldiers. . . . Plaintiff's theory equating The Citadel to a service academy is also troubling in that this court can see no significant distinction between what The Citadel does and what many private secondary schools do: using a military model as a basis for instilling discipline and providing leadership training.

Under plaintiff's theory, every high school military academy would be engaged in an "exclusive state function." The long standing prevalence of such private institutions, demonstrates the non-exclusivity of military model training. Indeed, it would appear that most high schools based on a military model are private institutions, although Junior ROTC is offered at a number of public schools as a component of the educational offerings.
Mentavlos, 85 F. Supp.2d at 622-623.

This is not the rare case in which the plaintiff can complain that any failure of The Citadel to intervene in actions taken by private persons has given rise to state action because again, the evidence is undisputed that plaintiff failed to avail herself of the many resources that the school made available to her to address any problems that she might encounter as a freshman cadet. *See* 249 F.3d at 309-310 (noting that Mentavlos did not voice the majority of her complaints until just before withdrawing in December).

The District Court and Fourth Circuit properly concluded "that The Citadel is in the business of providing a post-secondary education with a goal of assisting students to achieve a well-rounded development in all spheres of life and with an emphasis on leadership training. That the school seeks to achieve these goals through a military model may make its system of training fairly unique. It does not, however, convert the primary business of The Citadel into that of producing military officers. It is beyond dispute that providing post-secondary education is not traditionally an exclusive state function. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (while providing high school level education is a public function, it is not traditionally the exclusive province of the state)." *Mentavlos*, 85 F. Supp.2d at 624.

The ramifications of finding state action in this case are dangerous. A holding that student cadets are state actors, particularly those not specifically in a plaintiff's chain of command, could convert any state law tort

occurring between students into a potential constitutional claim in the federal courts. The result urged by the Petitioner could be extended to encompass the students at all manner of institutions, as the District Court and Fourth Circuit prudently recognized.

IV. The District Court properly granted summary judgment to Respondent Saleeby because Petitioner failed to produce any evidence of gender-based discrimination on his part.

Here, even if defendant Saleeby could be fairly categorized as a state actor, the District Court properly entered summary judgment in his favor as the record reveals no evidence that Saleeby's actions toward the plaintiff were in any way motivated by gender bias. "In her deposition in this action, plaintiff conceded that, with the exception of the fire incident, Saleeby's actions towards her were just playful harassment" and that from the beginning, she felt "that [Saleeby] was a professional cadet." *Mentavlos*, 85 F. Supp.2d at 615.

It is now evident that Saleeby did not wear "only boxer shorts" when entering plaintiff's room. *Mentavlos* at 619 n.15. And even the most cursory glance at the photograph of the shirt that plaintiff was wearing during the fire incident confirms that her breasts were in no way involved. (Appendix at p.).

Although the District Court held that plaintiff's evidence of gender motive as to defendant Anderson was weak, it declined to enter summary judgment in Anderson's favor on this basis. But as there is no suggestion in the record that Saleeby 's actions were *ever* motivated by any gender-based animus toward the plaintiff, and as his actions indeed suggest the opposite, the District Court properly entered summary judgment for Saleeby on this issue as well.

CONCLUSION

For the reasons stated, a writ of certiorari should not be granted to review the proper decision and judgment of the Fourth Circuit.

Respectfully submitted,

Sandra J. Senn
Counsel of Record
Stephanie P. McDonald
Post Office Box 12279
Charleston, South Carolina 29422
(843) 556-4045
Counsel for Respondents

Charleston, South Carolina
September 5, 2001

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